Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

WILLIAM L. PATTERSON,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 959,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the right to remove a case from state to federal court waived by participating in the litigation for more than thirty days without giving notice of the automatic stay in bankruptcy?

2. Does rejection of the the non-moving party's version of the facts and viewing the facts in the light most favorable to the moving party in granting summary judgment deny due process of law and the right to trial by jury guaranteed by the Fifth and Seventn Amendments to the Constitution?

TABLE OF CONTENTS

Questions Presented i

Table of Contents. ii

Table of Authorities. iv

I. Petition for Writ of Certiorari 1

II. Statement of Jurisdiction 1

III. Applicable Constitional Provisions and Statutes 1

IV. Statement of the Case. 3

A. Statement of Facts 3

B. Proceedings 14

V. Argument Stating Reasons for Granting the Writ. 16

A. The Right of Removal Was Waived . 16

B. The Rejection of the Non-Moving Party's Version of the Facts in Granting Summary Judgment Denied Due Process of Law and the Right to Trial by Jury Guaranteed by Fifth and Seventh Amendments to the Constition 19

VI. Conclusion 28

APPENDIX

Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing

en Banc A1

Opinion of the Court of Appeals A3

Dissenting Opinion A12

District Court Order Denying Summary Judgment A20

District Court Order from Chambers (Granting Summary Judgment) A34

Judgment in a Civil Case A36

TABLE OF AUTHORITIES

Cases

Airline Pilots Association v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991) 24

Brown v. Demco, Inc., 792 F.2d 478 (5th Cir. 1986). 17

Cantrell v. Great Republic Insurance Co., 873 F.2d 1249 (9th Cir. 1989). 17

Douglass v. Weyerhaeuser Co., 662 F.Supp. 147 (C.D. Cal. 1987). 19

Easley v. Pettibone Michigan Corp., 990 F.2d 905 (5th Cir. 1993). 18

Eldridge v. Felec Services, Inc., 920 F.2d 1434 (9th Cir. 1990). 25

Frazer v. United States, 18 F.3d 778 (9th Cir. 1994). 28

Hillman v. Nationwide Mutual Fire Insurance Co., 855 P.2d 1321, (Alaska 1993). 25

Hubbard v. Union Oil Company of California, 601 F.Supp. 790 (S.D. W.Va. 1985). 19

In Re Schwartz, 954 F.2d 569 (9th Cir. 1992). 18

Patterson v. International Brotherhood of Teamsters, Local 959,

(This case), 121 F.3d 1345 (9th Cir. 1997). 1

Patterson v. State of Alaska, Department of Agriculture, 880 P.2d 1038 (Alaska 1994) cert. denied 513 U.S. 1127 (the other defendant to this case). 14

Peterson v. Kennedy, 771 P.2d 1244 (9th Cir. 1985), cert. denied, 475 U.S. 1122. 24

Rezendes v. Dow Corning Corp., 717 F.Supp. 1435 (E.D. Cal. 1989). . . . 19

S.M. v. Jones, 794 F.Supp. 638 (W.D. Tex. 1992). 18

Schmidt v. IBEW, Local 959, 980 F.2d 1167 (8th Cir. 1992). . . . 24, 25

Sever v. Alaska Pulp Corp., 978 F.2d. 1529 (9th Cir. 1992) 25

Sikes v. Global Marine, 881 F.2d 176 (5th Cir. 1989). 18

Constitutional Provisions

Fifth Amendment 1, 19

Seventh Amendment 1, 19

STATUTES

11 U.S.C. 362(a)(1). 2, 15, 18

28 U.S.C. 1254(1) 1

28 U.S.C. 1446. . . . . 2, 17

28 U.S.C. 1447(c). 3

TREATISES

C. Wright, A. Miller and M. Kane, 10 Federal Practice and Procedure, Civil 2d, §§ 2524 and 2525 . . . . . 19, 20

C. Wright, A. Miller and E. Cooper, 14A Federal Practice and Procedure, Civil 2d, § 3732. 19

I. PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals filed August 15, 1997, Case No. 95-36227,[1] petition for rehearing denied October 2, 1997, both reprinted in the Appendix hereto, in order to review the standards for denying trial by jury by granting summary judgment and to resolve a conflict between the circuit courts as to whether actions taken in ignorance of the automatic stay in bankruptcy are void or voidable.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is being timely filed in accordance with Rule 13.1 of this court.

III. APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

Relevant portions of constitutional provisions and statutes pertaining to this petition are as follows:

Fifth Amendment to U.S. Constitution

> No person shall be. . .deprived of life, liberty, or property without due process of law;. . ..

Seventh Amendment to U.S. Constitution

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury

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[1] The opinion of the Court of Appeals is reported in 121 F.3d 1345 (9th Cir. 1997).

shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according the rules of the common law.

11 U.S.C. § 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;. . ..

28 U.S.C. § 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil

> action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1447. Procedure after removal generally.

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made with 30 days after the filing of the notice of removal under section 1446(a). . ..

IV. STATEMENT OF THE CASE

A. Statement of Facts

Patterson was employed by Matanuska Maid Dairy from March 6, 1979 to April 30, 1986 and also on June 3 and 4, 1986. He was a member of General Teamsters Local 959 and had been for about 18 years. He worked mainly as a driver/salesperson in the distribution department. (ER 29, Ex. 2 (Patterson Aff.), ¶ 2).[2]

Patterson served during 1965-66 in the war in Vietnam where he was given some very stressful assignments driving a tank carrier and wrecker

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[2] References to "ER" are to the Excerpt of the Record filed with the Court of Appeals.

by himself in areas which were infiltrated by the enemy, with nothing for protection but an M-1 rifle and 20 rounds of ammunition. Vehicles he was driving were fired on and hit many times, but Patterson was not hit. He also was exposed to Agent Orange. (ER 29, Ex. 2, ¶ 3).

On August 25, 1980, a psychiatrist diagnosed Patterson as suffering from a delayed stress reaction to the combat situation, commonly referred to as post-traumatic stress disorder (PTSD), and the psychiatrist wrote a letter to the manager of Matanuska Maid indicating Patterson's diagnosis. The letter was retained in Patterson's personnel file along with an article describing PTSD, its symptoms and manifestations. (ER 29, Ex. 2, ¶ 4). Despite his PTSD, which has a strong negative effect on interpersonal relationships, during the first four or five years of Patterson's employment at Matanuska Maid, he performed his job and got along quite well, although he was sometimes late for work due to a sleep disorder, a symptom of PTSD, and his work day started at 6:00 a.m. (ER 29, Ex. 2, pp. 4 & 5).

In the fall of 1983, Matanuska Maid was in financial trouble and filed for pro- tection under Chapter 11 of the Bankruptcy Code, which resulted in changes in manage- ment personnel. Patterson believes his difficulties became serious and began to accelerate when Ron Wilde was hired as sales manager in about June, 1984. Patterson's lack of rapport with Wilde became apparent about two weeks after Wilde was hired. Patterson refused Wilde the key to the company gas pump for use in his private car, telling Wilde that he should buy his gas from his gas allowance and not steal from the company. (ER 29, Ex. 2, ¶ 7). A few weeks later, in Patterson's view, Wilde caused an incident which made it appear that Patterson had stolen a can of soda pop from a customer. A disciplinary

action was written up and placed in Patterson's personnel file. Patterson sought assistance from a Local 959 business representative, but the record remained in his file. Patterson was told by the plant manager that Wilde had made a comment that he would get rid of Patterson and that Patterson should cover his tracks. (ER 29, Ex. 2, ¶ 8).

As the tension between Patterson and Wilde increased, the resulting stress on Patterson increased his sleep disturbances and other symptoms of PTSD and he was reprimanded for being late for work (ER 29, Ex. 2, ¶ 9). Late in 1984, Wilde gave Patterson a lay off notice on the pretext there was insufficient work, while several employees with less seniority than Patterson were not laid off, especially those who were non-union. Patterson sought assistance from Local 959, but got none, so he went to the NLRB and that resulted in his prompt reinstatement. (ER 29, Ex. 2, ¶ 10). The same thing happened again in the spring of 1985. These circumstances increased the stress on Patterson and, because of his PTSD, he did not deal with stress very well. He tended to become angry and talk back to supervisors and sometimes even to customers. (ER 29, Ex. 2, ¶ 11).

In the fall of 1984, the State of Alaska, Department of Agriculture, the largest creditor of Matanuska Maid, nominated John Seawell to manage the dairy and he was appointed by the Bankruptcy Court. Seawell brought in other new management personnel, including Steve Bevins as distribution manager, Patterson's immediate supervisor. Initially Patterson and Bevins got along quite well and socialized with each other for a few weeks, but Patterson found that Bevins had habits which he could not condone and the social relationship faded out. (ER 29, Ex. 2, ¶ 12).

As the stress between Bevins and Patterson increased during the fall of 1985 and early 1986, Patterson's PTSD symptoms also increased. If Patterson was late for work, Bevins reprimanded him, which increased the stress and sleep disturbances. (ER 29, Ex. 2, ¶ 15). On February 6, 1986, Bevins wrote a letter to Bobby Sinnett, Secretary-Treasurer of Local 959, the chief executive officer, accusing Patterson of outrageous conduct, such as harassing telephone calls to female employees, trying to poison Bevins and customer complaints. Patterson was given a copy on February 14, 1986 by Jerry Fuller, a Local 959 business representative. Patterson denied Bevins' allegations and so informed Fuller and Sinnett and wrote his responses in the margins of the letter. He investigated the sources of the allegations and obtained letters from customers and other documentation disproving Bevins' statements and gave them to the Fuller. Patterson was told by the receptionist at Matanuska Maid that she heard Bevins and Wilde collaborating on the letter. Patterson wrote to Seawell denying the allegations, asking for a written apology and requesting that the letter be removed from his personnel file. He was assured that the letter would never be used against him again. (ER 29, Ex. 2, ¶¶ 16 & 17).

In April, 1986, a new collective bargaining agreement (CBA) between Local 959 and Matanuska Maid was put in effect and ratified by the union on April 15, 1986. However, there were still pending negotiations about some provisions and Patterson was interested in the provision for dental care and wanted to attend the meeting when it was discussed. At that time he had no official capacity in the union, so he was told that he would have to obtain permission from Sinnett to attend the meeting. After attempts to make contact with Sinnett by telephone and when he was at the restaurant in the union hall

for lunch or coffee breaks, he was informed that the best time to find Sinnett was early in the morning when he was arriving for work. On the morning of April 30, 1986, after arriving for work at 6:00 a.m. and seeing that his truck was loaded, Patterson punched in and gathered up his paper work to leave. Before leaving, he told Bevins and another foreman that he would be going to the Teamster hall first thing to try to make contact with Sinnett. He then went to the Teamster hall and into the restaurant to take a morning coffee break and get his paper work in order for the day while he watched for Sinnett. While there, he saw at least three other Matanuska Maid drivers also in the restaurant, having driven there in company trucks, just as Patterson had done. (ER 29, Ex. 2, ¶¶ 19-21).

Patterson's training as a driver was that it was standard operating procedure to take a coffee break first thing and get the paper work in order for the day, before making deliveries, so he always followed that procedure and other drivers did the same. Also, it was too early to make deliveries to most of the customers, some of whom did not accept deliveries before 7:00 a.m. The managers knew where the drivers had their coffee breaks and that they deviated from their routes to go to those restaurants and no driver had ever been reprimanded for doing so. In fact, Bevins had been with Patterson in a company truck to have lunch at the restaurant in the Teamster Mall. (ER 29, Ex. 2, ¶ 22). On the morning of April 30, 1986, after Patterson had been in the restaurant about 25 minutes, completed his coffee break and put his papers in order, he still had not seen Sinnett, so he left and headed for his first delivery. While he was stopped at a stop sign before exiting the parking lot, a pickup truck hit his truck in the rear end, causing substantial damage to the pickup truck but none to the Matanuska Maid truck. The police were called and the other

driver was given a citation. Bevins arrived during the investigation. After the investigation, Patterson left and made his deliveries, returning to the dairy about 11:00 a.m. Shortly thereafter, he was informed that his employment was terminated. Patterson did not believe he had done anything wrong, so he intended to file a grievance. He went immediately to see Sinnett, who was not available, so Patterson met with Ed Conyers, who had recently been assigned as business representative to Matanuska Maid (ER 29, Ex. 2, ¶ 23).

Conyers and Patterson went together to the dairy to meet with Seawell and his assistant in an attempt to reason about the incident, but without success. Later that day, Conyers was given the termination letter which stated that Patterson was terminated effective immediately. The reasons given were,

> Unauthorized use of company equipment for personal use.
>
> Gross disobedience.
>
> Second accident within a year involving property damage to others.

(ER 29, Ex. 2, ¶ 24).

Patterson thought Sinnett was the best qualified person to represent him and he continued to believe that Sinnett would represent him in the arbitration until the morning of the arbitration hearing. In retrospect Patterson thinks that since his case involved the most serious grievance being handled by Local 959 at the time, Sinnett should have realized that Patterson should have been represented by the general counsel, the best qualified person (ER 29, Ex. 2, ¶ 25).

Although Patterson thought Sinnett was handling his case, he rarely got to talk with Sinnett, even though he constantly tried to make contact to discuss the case. From April 30 to June 23, 1986, the date of the arbitration hearing, Patterson did not get to discuss the case with Sinnett more than two or three times, even though he visited the Teamster hall virtually every day. The conversations he had with Sinnett were brief and incomplete. On one occasion, Sinnett told him Matanuska Maid was trying to negotiate him out of a job. Patterson had several conversations with Conyers, approximately six to 10 times in which his case was discussed, but those conversations were brief, except for one which lasted an hour or more when materials in the personnel file were discussed. However, not everything was covered and Patterson was led to believe they would meet again to complete the discussion, but they never did. (ER 29, Ex. 2, ¶ 26).

About May 12, 1986, Conyers and Sinnett told Patterson that the company had offered to resolve the matter by a period of suspension without pay and a letter of reprimand rather than termination. Patterson said he did not think he should be suspended or reprimanded because he had done nothing wrong, but he would accept such a settlement rather than lose his job. Consequently, he believed that termination was no longer an issue, but that pay for a period of 30 days would require arbitration. On June 2, 1986, the 30 days having elapsed, he reported for work at the usual time, but Bevins told him to get off the property and called the police and had Patterson cited for trespassing. But the City Attorney did not pursue the citation. (ER 29, Ex. 2, ¶¶ 27 & 28).

In the late afternoon of June 2, 1986, Patterson found a message on his telephone answering machine from Conyers telling him to

report for work at 8:00 a.m. the next morning, with no explanation. Patterson reported for work the next day and worked the entire day on the loading dock. At noon, two other employees and Patterson went next door to McDonald's to buy a hamburger and then punched out after they returned to the dairy. Bevins reprimanded Patterson for not punching out before going and wrote up a corrective action for his personnel file, but did not reprimand the other employees. Bevins also reprimanded Patterson for smoking even though he was in an area where smoking was permitted, but did nothing as to two other employees who were smoking in a non-smoking area. (ER 29, Ex. 2, ¶¶ 29 & 30).

The next day, Patterson worked until approximately 3:00 p.m. when he was called to Seawell's office. Seawell and his assistant presented him with two letters and told him to sign them. The first was a short letter acknowledging that he had received the other letter and that he was being allowed to retain his employment subject to the terms of the second letter, which, if he violated in any way, he would be immediately and finally terminated. The second letter was a lengthy letter of reprimand, relating events from the company point of view, which Patterson viewed as being distorted and untruthful. Patterson thought he was being set up to be finally terminated for any trivial excuse. He said he wanted to discuss them with Sinnett before signing, but he was told to sign or get off the premises. He did not sign, so he was escorted to the time clock and punched out. He then attempted to call Sinnett, but Bevins broke the telephone connection and reprimanded him for making a personal call on company time and wrote it up for Patterson's personnel file. (ER 29, Ex. 2, ¶ 31). The next morning, Patterson met with Conyers and they went to Sinnett's office, where they met Seawell leaving. Patterson said he

wanted to pursue the grievance to arbitration. He does not recall having any contact with Sinnett between then and the arbitration hearing on June 23. Also, he had little or no contact with Conyers, and did not discuss the case in any depth with Conyers prior to the morning of the arbitration hearing, even though he visited the Teamster hall almost every day to take calls for any available jobs and attempted to make contact with Sinnett and Conyers while he was there, but they seemed to be avoiding him. (ER 29, Ex. 2, ¶¶ 32 & 33).

In the late afternoon of June 20, 1986, Patterson found a message on his telephone answering machine from Conyers advising him that the arbitration hearing would begin at 9:00 a.m. on Monday, June 23, 1986. Conyers also advised that there would be a letter for him to pick up at the Red Apple Restaurant. On the morning of June 23, he went to the restaurant and picked up the letter, which stated:

> Your arbitration is scheduled for Monday, June 23, 1986, at 9:30 a.m....
>
> I left a message on your phone recorder. I just wanted you to be aware that when I put you on the witness stand, they will have the right to cross-examine. Do not let them fluster you. Answer briefly, "yes" or "no" if cross-examined. Review, for yourself, your work history and the incident for which you were fired.
>
> Also, get a statement from Gary Arp (the union steward) with regard to your conversation about meeting to review the contract and your assistance to him as shop steward. He can be a witness if he wants to, but a statement will suffice. Fewer witnesses equals fewer

cross-examinations and less chance for error. Also, union witnesses cannot be on company time; he would have to take time off. Thank you.

Sincerely,

Ed R. Conyers, Business Representative

(ER 29, Ex. 2, ¶¶ 34 & 35).

Conyers had not discussed Patterson's testimony with him. Nor had he discussed who should be witnesses on Patterson's behalf. He had not discussed what documents could be used as exhibits or the scope of the hearing. There had been very little discussion about Bevins' February 6, 1986 letter to Sinnett, but Patterson had gone over the letter thoroughly in March with Jerry Fuller, the previous business representative, and Patterson had provided documentation to refute the letter. In reviewing the personnel file, Conyers was aware of Patterson's PTSD condition, but had not discussed whether or not that was a factor in the termination. When Patterson got the letter from Conyers, it was too late to get a written statement from Arp. At Patterson's insistence, Arp and two other persons testified as witnesses on Patterson's behalf, and Patterson provided documentation refuting Bevins' letter and support letters from customers, which, upon Patterson's insistence and with Conyers' disapproval, the arbitrator accepted into evidence for "whatever they were worth." (ER 29, Ex. 2, ¶ 36).

Despite the fact that Patterson had been told that the Bevins letter would not be used against him, it was brought up in the arbitration hearing by the first witness, Bevins, and Conyers did not object. The hearing centered around that letter, rather than the termination

letter. Conyers did not seek to extend the hearing or continue it so he could deal with the letter, but insisted that the hearing had to be completed in one day. (ER 29, Ex. 2, ¶ 37).

At the hearing, Patterson was made aware for the first time of four corrective actions written up by Bevins during the month of April, which had been given to Conyers about a week before the hearing, but he had not discussed them with Patterson. The corrective actions on June 3 and 4, which Patterson had not previously seen, and a customer complaint which Conyers had not previously discussed with Patterson, also were presented at the hearing. Patterson does not recall Conyers objecting to any of those new matters, which were not mentioned in the termination notice. Patterson subsequently tried to obtain a duplicate of the tapes of the hearing, but the arbitrator said they had been erased. (ER 29, Ex. 2, ¶ 38).

In final argument, Conyers argued that termination was not warranted because there were mitigating circumstances. In the arbitrator's decision, he commented about Patterson's PTSD, but stated he could not draw any conclusions from that because he was not qualified to practice medicine. Conyers had not prepared to present any expert medical evidence at the hearing as a basis for suggesting that treatment would be an appropriate alternative to termination. (ER 29, Ex. 2, ¶ 39).

A few days after the hearing, Conyers and Patterson met and discussed it. It appeared that the hearing had not gone well and in anticipation of an adverse result, Patterson asked Conyers where he was to go from there and was told that the union could do nothing further. He was told, "It is a civil matter." Conyers did not inform Patterson of any statute of limitations and he did not suggest that

Patterson should obtain advice from Local 959's general counsel. (ER 29, Ex. 2, ¶ 41).

Some time during July, 1986, Patterson was informed of the arbitrator's decision upholding the termination and he received a copy of the written decision, which is dated July 2, 1986. (ER 29, Ex. 2, ¶ 42).

After that, Patterson attended over 100 job calls at the union hall but received no gainful employment, even though he had been a member of Local 959 for many years. His seniority, indicated by ledger number 6595, out of more than 80,000 members registered with the local to that time, indicates that he was blackballed by Local 959 to assure that he would not be able to afford to pursue civil litigation. This series of events aggravated Patterson's PTSD to the point that both the Social Security Administration and the Veterans Administration determined that he was 100 percent disabled and unemployable. (ER 29, Ex. 2, ¶ 43).

B. Proceedings

On April 28, 1988, Patterson filed a Complaint in the Superior Court for the State of Alaska, Case No. 3AN-88-4692 Civil, naming Matanuska Maid, Inc.; Seawell; Wilde; Bevins; Local 959; Sinnett; Conyers; Jerry Thorn, the arbitrator; and others as defendants (ER 7 - Complaint). Summons and Complaint were served on Local 959 on May 11, 1988 (ER 5 - Memorandum, p. 4).[3] Local 959 filed its Answer to the

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[3] This summary is limited to proceedings against Local 959. Final disposition of proceedings against other defendants on the basis of the statute of limitations is described in Patterson v. State of Alaska, Department of Agriculture, et al., 880 P.2d 1038 (Alaska

Complaint on June 21, 1988 (ER 7 - Answer).

On July 1, 1988, Local 959 filed a Motion to Dismiss, explaining in a memorandum that proceedings against it were stayed pursuant to 11 U.S.C. 362(a)(1) and attaching a copy of its Voluntary Petition Under Chapter 11 (ER 7 - Motion, etc.).

On September 20, 1988, K.L. Hunt, Superior Court Judge, issued a "Final Order and Stay" as follows:

> The motion to dismiss defendants R. J. Sinnett and E.R. Conyers is granted. The motion to dismiss General Teamsters Local 959 is denied and a stay is hereby ordered of all proceedings against it pursuant to U.S. Bankruptcy Code §362.

(ER 7 - Motion, p. 2).

On April 30, 1991, Patterson filed an adversary complaint against Local 959 in the United States Bankruptcy Court (ER 25 -Ex. 1, Witt Affidavit, p. 5). On March 7, 1994, the Bankruptcy Court issued a Memorandum Decision granting summary judgment in the nature of abstention to Patterson, also finding genuine issues of material fact to be litigated and allowing Patterson to pursue his claims against Local 959 in the state court action, Case No. 3AN-88-4692 Civil (ER 29, Ex. 1).

On March 31, 1993, Local 959 filed and served

1994), cert. denied, 513 U.S. 1127. Patterson also had filed a complaint for libel on February 5, 1988 against Matanuska Maid and its officers based on Bevins' February 6, 1986 letter. The two cases were consolidated on November 21, 1988, so the appeal disposed of both cases.

a Notice of Removal from the state court to the United States District Court for the District of Alaska (ER 1). On April 11, 1994, Patterson filed a Motion to Remand (ER 5) and the district court filed an order denying the Motion to Remand on May 12, 1994 (ER 10).

Patterson filed an Amended Complaint on July 25, 1994 (CR 21) and Local 959 filed an Answer on October 31, 1994 (CR 22).

On January 30, 1995, Local 959 filed a Motion for Summary Judgment (ER 25), Patterson filed opposition on March 1, 1995 (ER 29), Local 959 filed a reply on April 3, 1995 (ER 37) and the Court on September 8, 1995 filed an order granting the Motion for Summary Judgment on all issues except one (ER 39).

On September 25, 1995, Local 959 filed a Second Motion for Summary Judgment, seeking judgment on the remaining issue (ER 40), Patterson filed opposition on October 23, 1995 (ER 43), Local 959 replied on October 27, 1995 (ER 44) and on November 27, 1995, the Court issued an order granting the motion and dismissing the action (ER 45). Judgment was filed November 7, 1995 (ER 46).

Patterson's Notice of Appeal was filed November 22, 1995 (ER 47).

V. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

A. The Right of Removal Was Waived

The chronology pertinent to removal in this case is as follows:

May 11, 1988 -- service of Summons and Complaint on Local 959 (ER 5 - Return of Service).

June 21, 1988 -- Local 959 files Answer to Complaint (ER 7 - Answer).

July 1, 1988 -- Local 959 files Motion to Dismiss, attaching Voluntary Petition Under Chapter 11 (ER 7 - Motion, etc.).

September 20, 1988 -- Superior Court enters "Final Order and Stay," citing 11 U.S.C. 362, denying Local 959's Motion to Dismiss but staying all proceedings against it (ER 7 - Motion, p. 2).

March 7, 1994 -- Bankruptcy Court files judgment abstaining and permitting Patterson to pursue his claims against Local 959 in state court Case No. 3AN-88-4692 Civ. (ER 29, Ex. 1).

March 31, 1994 -- Local 959 files and serves Notice of Removal (ER 1).

April 11, 1994 -- Patterson files Motion to Remand to state court (ER 5), denied May 12, 1994 (ER 10).

Removal of a civil action from state to federal court is permitted when the federal court has jurisdiction, provided the petition for removal is filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. 28 U.S.C. 1446(b). The right to removal may be waived by participating in the proceeding in state court and failing to file "removal within 30 days after notice." Cantrell v. Great Republic Insurance Co., 873 F.2d 1249, 1256 (9th Cir. 1989); Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986)("Even a defendant who petitions timely may have waived its right to removal by proceeding to defend the action in state court

or otherwise invoking the processes of that court." (Footnote omitted.)).

In this case the district court and the court of appeals held that since the automatic stay provided by 11 U.S.C. § 362(a), unknown to Patterson and the state court, was in effect during the expiration of more than thirty days after service on Local 959 and its participation in the litigation, the suit against it was void and a nullity, see In re Schwartz, 954 F.2d 569, 571-72 (9th Cir. 1992), until the stay was lifted by the bankruptcy court. As a result, it was held that the Notice of Removal filed within 30 days after the stay was lifted was timely.

But there is a conflict among the circuits as to whether an action contrary to the stay of 11 U.S.C. § 362 is "void" or "voidable." This conflict is discussed extensively in Easley v. Pettibone Michigan Corp., 990 F.2d 905, 909-12 (6th Cir. 1993). That court, citing cases from the various circuits, points out that the majority have held that actions in violation of the stay are "void." Until then, only the Fifth Circuit had explicitly held that actions taken during the pendency of the stay are "voidable." Sikes v. Global Marine, 881 F.2d 176, 178 (5th Cir. 1989). See Easley, 990 F.2d at 909. The Easley court then reasoned that a void action cannot be validated, but a voidable or invalid action can be made valid. Id. The court then points out that the bankruptcy court may validate actions and that most of the circuits have recognized equitable circumstances under which such actions may be validated. Easley, 990 F.2d at 910-11. The court then held, "that actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances. Easley, 990 F.2d at 911.

The removal statute time limit is strictly construed. See, S.M. v. Jones, 794 F. Supp.

638, 639 (W.D. Tex. 1992); Rezendes v. Dow Corning Corp., 717 F. Supp. 1435, 1437 (E.D. Cal. 1989); Douglass v. Weyerhaeuser Co., 662 F. Supp. 147, 149 (C.D. Cal. 1987); Hubbard v. Union Oil Company of California, 601 F. Supp. 790, 795 (S.D. W.Va. 1985); C. Wright, A. Miller and E. Cooper, 14A Federal Practice and Procedure, Civil 2d, § 3732 at 527.

If actions taken in ignorance of the stay are voidable, as opposed to void, Local 959's failure to give notice of the stay to the state court and to Patterson and participating in the litigation for more than 30 days amounted to waiver of the right to remove the case to federal court, especially in view of the strict construction of the removal statute.

B. The Rejection of the Non-Moving Party's Version of the Facts in Granting Summary Judgment Denied Due Process of Law and the Right to Trial by Jury Guaranteed by the Fifth and Seventh Amendments to the Constitution

The right to trial by jury is among the most revered of the rights protected by the Constitu- Constitution. This includes the right to a jury trial in civil actions involving $20.00 or more as provided by the Seventh Amendment. To assure that this right is protected, courts generally take great care not to deprive a nonmoving party of a full trial once it is shown that a genuine issue of fact exists. C. Wright, A. Miller and M. Kane, 10 Federal Practice and Procedure, Civil 2d, § 2714 at 623. In support of this, Wright quotes:

> The federal Constitution gives a right of jury trial in a contested issue in a law action. This right is positive and should not be whittled away by

> decision of contested issues by a judge at hearings in camera before trial. Griffeth v. Utah Power & Light Co., C.A.9th, 1955, 226 F.2d 661, 669.

Id. at n.9. Similarly, it has been commented that, "Summary judgment, with ever-lurking issues of fact, is always a treacherous shortcut... ." C. Wright, A. Miller and M. Kane, 10 Federal Practice and Procedure, Civil 2d, § 2725 at 88. Like motions for directed verdict, motions for summary judgment deprive a party of a determination of the facts by a jury and should be "cautiously and sparingly granted." Id., § 2524, Vol. 9A at 249-50. In deciding such motions, the court is not free to weigh the evidence or pass on credibility of witnesses, and the court must view the evidence most favorably to the nonmoving party. Id. This is the due process of law in considering summary judgment.

But the district court and court of appeals weighed the evidence, determined credibility of witnesses and viewed the evidence most favorably to the moving party.

They almost entirely disregarded Patterson's version of the facts, quoted the record out of context and considered the facts in isolation, rather than in their relationship to each other.

It is generally recognized that a case should not be taken from the jury when reasonable men could reach different conclusions based on the evidence. Wright, supra, § 2524 at 260-64. The motion for summary judgment in this case has been before five judges: Judge Ross of the bankruptcy court, Judge Singleton of the district court, and a three judge panel of the court of appeals. Two of the five judges differ with the other three. Assuming the five judges may be regarded as reasonable men, it appears

that the available evidence in this case may lead reasonable men to different conclusions.

Judge Ross concluded:

> Also, I think that genuine issues of material fact have been raised which are in dispute. These include the direct conflict between the Conyers Affidavit regarding preparation for the arbitration with those of Patterson. In addition, there is Bob Sinnett's statement to John Seawell, Matanuska Maid's president, that he hoped that Matanuska Maid would win because this is possibly the only way they could get rid of Patterson. . . .
>
> So, reading the facts most favorably to Patterson, I think that there are genuine issues of material facts in dispute which make summary judgment impossible to ultimately resolve this case.

(ER 29, Ex. 1 at 3-4).

The dissent to the Court of Appeals Opinion also discusses specific examples of genuine issues of fact.

Both the district court and the majority of the court of appeals panel tortured the evidence denoting collusion between the union and the employer, referring to Seawell's notes as to Sinnett's comments at a meeting on June 5, 1986. They both quote a fragment of the notes and conveniently omit the preceding two sentences, which give meaning to the fragmentary quote. In proper context, the quote should be:

> Visiting Sinnett's office, he told me that Patterson has been to the NLRB with allegations that 959 not representing him. He has been

> threatening suit of Matanuska Maid and 959, etc. Sinnett's comments: "You've got to win. He might leave the state. That's the only way I can get rid of him.

Both Seawell and Sinnett, because the quote is not closed, say that Sinnett did not mean he wanted to get rid of Patterson, but the context clearly makes it appear that he did and that he did not want to win Patterson's arbitration case. The district court mistakenly said that Patterson had been to the NLRB about this matter, but Sinnett knew that Patterson had gone to the NLRB because the union did not help him when he was laid off in 1984 and again in 1985. (ER 29, Ex. 2, ¶¶ 10 & 11). Taking the history into account, it appears that Sinnett considered Patterson to have been a thorn in his side for years. But the district court and the court of appeals chose to overlook the history which clearly indicated a genuine issue of fact, even though the history was put before them. They simply chose to disregard the facts presented by Patterson.

The district court also chose of overlook that Patterson, according to Sinnett, had been threatening to "sue Matanuska Maid and 959, etc." when it said there was no evidence that Sinnett had a motive to want to get rid of Patterson. Surely a reasonable fact finder could conclude that Patterson's going to the NLRB repeatedly over a period of years and threatening to sue the Local could motivate Sinnett to want to be rid of Patterson.

Once it is accepted that Sinnett and Seawell may have been in collusion, a lot of other things seem to fit into place. For example, on February 6, 1986, when Bevins wrote the libelous letter about Patterson, Seawell personally delivered the letter to Sinnett and discussed it

with him. (ER 29, Ex. 2 at 8). Sinnett was very well aware of Seawell's attitude about Patterson when he "settled" Patterson's grievance and had Conyers tell Patterson to report for work on June 3, 1986, without advising Patterson of the terms of the settlement and without having seen the reprimand letter that Patterson would be asked to sign. Either Sinnett wanted Patterson to reject the settlement and have another heated exchange with the company officers or he was more than grossly negligent not to take steps to prevent that from happening, because he was aware of the hostile relationship.

Conyers said he prepared thoroughly for the arbitration hearing and the district court accepted Conyer's version and rejected Patterson's contradiction that he thought Sinnett was going to represent him, but he had little or no opportunity to talk about the case with Sinnett and very little opportunity to discuss it with Conyers. This is corroborated by Conyer's letter to Patterson which he received on the morning of the arbitration hearing, which is quoted above in the statement of facts. The letter makes it clear that Conyers had arranged for no witnesses and had no evidentiary exhibits and he had not discussed Patterson's testimony with him. Conyers said he had not prepared to defend against the Bevins letter, which was the major topic at the arbitration hearing, because he did not think it was admissible. He said he objected to admission of the letter, but when he was overruled, he did not ask for a continuance. The only defense was provided by Patterson. He had arranged for witnesses to contradict Bevins and he presented evidentiary exhibits, despite Conyers disapproval. And Conyers failed to arrange for any expert medical evidence about Patterson's PTSD, even though the arbitrator would have certainly considered such evidence

significant. See dissent to Court of Appeals Opinion in the appendix hereto for a good discussion of this issue.

After he was terminated by Matanuska Maid, Patterson attended over 100 job calls at the union hall, but obtained not gainful employment, making it appear that he was "blackballed." See, supra at 27. This seems to confirm that the union officers wanted to be rid of Patterson.

A finder of fact could view the foregoing facts as evidence that the union was merely going through the motions of defending Patterson while in fact it was in collusion with management to "get rid of him."

A union acts arbitrarily if it acts without any rational basis or if it simply ignores a meritorious grievance or handles it in a perfunctory manner. Peterson v. Kennedy, 771 P.2d 1244, 1254 (9th Cir. 1985), cert. denied, 475 U.S. 1122. The principles pertaining to breach of the duty of fair representation have been defined in Airline Pilots Association v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51 (1991) and reiterated in Schmidt v. IBEW, Local 959, 980 F.2d 1167 (8th Cir. 1992). The duty of fair representation imposes a responsibility "akin to the duties owed by other fiduciaries to their beneficiaries." It obliges a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Id. The court quoted further from O'Neill:

> ... [A] union's actions are arbitrary only if in the light of the factual and legal landscape at the time of the union's actions, the union's behavior is

> so far outside a 'wide range of reasonableness' as to be irrational."

Id. Perfunctory conduct is actionable if "in the light of the factual and legal landscape at the time of the union's actions ..." it is irrational. Schmidt, 980 F.2d at 1169 n. 4.

Collusion bewteen a union and management in the processing of a grievance is the epitomy of bad faith.

It is generally recognized that a CBA may be breached by imposing discipline contrary to the specific provisions of the CBA and company work rules, and also by breach of the implied covenant of good faith and fair dealing. Sever v. Alaska Pulp Corp., 978 F.2d. 1529, 1541 n. 9 (9th Cir. 1992); Eldridge v. Felec Services, Inc., 920 F.2d 1434, 1437-41 (9th Cir. 1990). In Hillman v. Nationwide Mutual Fire Insurance Co., 855 P.2d 1321, 1329 (Alaska 1993), the dissenting justices explained:

> The covenant of good faith and fair dealing requires that the party act with both subjective good faith and objective fairness.

In its so-called "Order Denying Summary Judgment," the district court appears to have disregarded entirely that in terminating Patterson, both the union and the company had the duty to deal with him in subjective good faith and objective fairness (ER 39, pp. 9-10). It was neither subjectively in good faith nor objectively fair to single out Patterson for termination for conduct which, despite a technical company rule, was routine procedure for Patterson and the other drivers, known to company supervisors and condoned for years. Patterson set forth in his affidavit that he was trained that it was standard operating procedure

to take a coffee break first thing and get the paper work in order for the day, before making deliveries, so he always followed that procedure. That was what he was doing on the morning he was terminated, and he also hoped to see Sinnett. He observed that other drivers did the same. Management knew that the drivers deviated from their routes to go to certain restaurants and no driver had ever been reprimanded for doing so. Patterson's immediate supervisor had been with Patterson to the restaurant in question in a company truck. While Patterson was there on the morning in question, he observed at least three other Matanuska Maid drivers in the restaurant, having driven there in company trucks. There was even a note in the handwriting of Bevins, Patterson's immediate supervisor, telling him that if he went to the Teamster Hall for lunch or whatever, not to leave the truck idling for 40 minutes. See, Statement of the Case at 5-7, 14.

As corroboration, Patterson presented a deposition of Richard Luster (CR 29, Ex. 3). Luster testified that he was a Teamster, he worked at Matanuska Maid from 1972 to 1985, and again, as a driver during 1988. He was the route supervisor or foreman who had trained and supervised Patterson. According to Luster, drivers drove their trucks to the Teamster Hall all the time while he worked there and also in 1988 when he returned, for such purposes as coffee breaks, lunch, to pick up glasses at the optometrist's and other reasons. None of them were ever disciplined for using company equipment for personal use. Luster Depo., pp. 7-11, 15-17, 19-22 and 27-34.

Patterson also presented a statement of Gerald L. Hood, dated December 21, 1987 (ER 29, Ex. 6). Hood, at that time, was director of negotiations; at present he is the CEO. Hood had researched Local 959's records and found no

instances of employees having been terminated by Matanuska Maid for unauthorized use of company vehicles.

Conyers did not interview any drivers or gather any information about their use of company vehicles. If he had done so, and had presented such evidence to the arbitrator, it is not so clear that it would not have changed the arbitrator's mind about whether Patterson's use of a company vehicle for personal use was just cause for termination, in view of the fact that he was doing what all of the drivers did as standard operating procedure, condoned for years by the company, especially if it had been pointed out to the arbitrator that under the circumstances terminating Patterson was a breach of the covenant of good faith and fair dealing implied in the CBA. Only by viewing the evidence in the light most unfavorable to Patterson and disregarding the covenant of good faith and fair dealing could the District Court have granted summary judgment to Local 959 on this issue. It cannot reasonably be said that Conyers' failure to investigate, prepare and present such evidence was not irrational. Of the three grounds stated in the termination notice, the use of company equipment for personal use was the only one found to be sufficient by the arbitrator (ER 29 - Memorandum, pp. 11-12).

Once Patterson was terminated and he asked Conyers where to go from there, he was told that it was a "civil matter." He was not told of the six month statute of limitations. That caused him to lose his case against the company without litigating the merits. The failure to advise Patterson of that applicable statute of limitations and the failure to advise him of the terms of the settlement were equivalent to merely "standing in" at sentencing, failing to advise of the right to appeal, and sleeping

through a portion of a trial in a criminal case. Frazer v. United States, 18 F.3d 778, 785 (9th Cir. 1994).

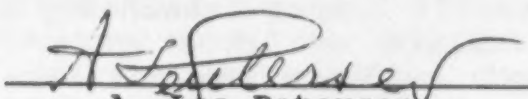
The failure of the district court and the court of appeals to recognize the Constitutional rights to due process of law and trial by jury has made it necessary to petition this court as the ultimate protector of those rights.

VI. CONCLUSION

The court is urged to grant the writ and, upon hearing the case, to reverse the summary judgment and order that the case be remanded to the state superior court for further proceedings.

Respectfully submitted the 30th day of December, 1997. Resubmitted the 20th day of January, 1998.

LAW OFFICES OF A. LEE PETERSEN, P.C.
Attorneys for Petitioner

By 

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM L. PATTERSON,	)	No. 95-36227
Plaintiff-Appellant,	)	
	)	D.C. No.
v.	)	CV-94-00147
	)	
INT'L BROTHERHOOD OF TEAMSTERS, LOCAL 959; CREAMERY CORPORATION D/B/A MATANUSKA MAID,	)	ORDER
Defendants-Appellees.	)	

Before: WALLACE, NOONAN and THOMPSON, Circuit Judges.

Judges Wallace and Thompson voted to deny the suggestion for rehearing en banc, and Judge Noonan voted to grant it. Judge Thompson voted to to reject the suggestion for rehearing en banc, Judge Wallace so recommended, and Judge recommended en banc rehearing should be granted.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the

court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM L. PATTERSON, Plaintiff-Appellant, v. INT'L BROTHERHOOD OF TEAMSTERS, LOCAL 959; CREAMERY CORPORATION D/B/A MATANUSKA MAID, Defendants-Appellants.	No. 95-36227 D.C. No. CV 94-00147-JKS OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
July 17, 1997--Anchorage, Alaska

Filed August 15, 1997

Before: J. Clifford Wallace, John T. Noonan and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson;
Dissent by Judge Noonan

OPINION

THOMPSON, Circuit Judge:

William L. Patterson appeals from the district court's summary judgment in favor of the International Brotherhood of Teamsters, Local 959

(Local 959). Patterson contends Local 959 breached its duty of fair representation while assisting him in his grievance and arbitration proceedings. We have jurisdiction pursuant to 28 U.S.C. §1291, and we affirm.

FACTS

Matanuska Maid Dairy (Mat-Maid) employed Patterson for approximately seven years as a driver and delivery person. One morning during his employment with Mat-Maid, on April 30, 1986, Patterson clocked into work and then drove his delivery truck to Local 959's offices to speak with a union representative. Paterson waited for the representative in a restaurant which was in the same building as Local 959's offices. When the representative did not appear, Patterson left for his first delivery. As Patterson was leaving the parking lot, a pickup truck struck him from behind. When Patterson returned to work after his deliveries, Mat-Maid informed him that he was terminated for cause.

Mat-Maid cited three reasons for the termination: gross disobedience, being in a second accident within a year involving property damage to others, and using Mat-Maid's delivery truck for personal business--driving to Local 959's offices in an attempt to speak with a union representative on a personal matter.

At the time Mat-Maid terminated Patterson, a collective bargaining agreement was in effect between Local 959 and Mat-Maid. When Mat-Maid informed Patterson of his termination, Patterson immediately went to Local 959's offices and discussed his termination with Edwin Conyers, the business representative assigned to administer the Mat-Maid collective bargaining agreement. That afternoon, Patterson and Conyers met with

John Seawell, Mat-Maid's general manager, and Joe Van Treeck, Mat-Maid's plant manager, in an attempt to settle the matter. No resolution was reached. As a result, Conyers filed a grievance with Mat-Maid on Patterson's behalf.

On May 12, 1986, Local 959 and Mat-Maid reached a tentative resolution of the grievance: Patterson would be given a letter of reprimand and a thirty-day suspension without pay. This proposed resolution, however, was not accepted by Patterson. He was adamant that he had done nothing wrong and should not be suspended without pay. Because he was unwilling to accept the settlement at that time. Mat-Maid and Local 959 agreed to extend the informal resolution period until June 2, 1986.

On June 1, 1986, without Mat-Maid's consent or a settlement in place, Patterson attempted to return to work. He was cited for trespass and escorted off Mat-Maid's property. Patterson then apparently agreed to accept the settlement. The following day, Conyers called and told him to report for work the next morning.

Patterson reported for work on June 3rd. On June 4th, Seawell asked Patterson to sign the letter of reprimand. Patterson viewed the letter as "a lengthy letter of reprimand from the company point of view" and as "distorted and untruthful." He refused to sign it and was escorted off the premises.

The next day Mat-Maid and Local 959 met in an attempt to salvage the settlement. Patterson, however, insisted on arbitration. Mat-Maid informed Local 959 that, because Patterson had rejected the proposed settlement, Mat-Maid considered Patterson terminated.

The parties then proceeded to arbitration. In July 1986, the arbitrator determined just cause supported Patterson's termination and rejected his argument that a lesser disciplinary sanction was appropriate. The arbitrator determined just cause existed because Patterson had used the Mat-Maid delivery truck for personal business. The arbitrator rejected the other two termination grounds of gross disobedience and being in a second accident. The arbitrator also determined a sanction less than termination was not appropriate based on Patterson's "almost continuous and predictable conduct that is disruptive of a struggling dairy trying desperately to survive." The arbitrator found that although Mat-Maid had given Patterson two opportunities "to start with a clean slate," Patterson continued to have disciplinary problems.

In 1988, Patterson filed a pro se action in Alaska state court against Mat-Maid, Local 959, and various other defendants. As relevant to this appeal, Patterson alleged Local 959 breached its duty of fair representation while representing him during his grievance and arbitration proceedings. He also asserted a wrongful discharge claim against Mat-Maid.

The state court action was stayed against Local 959, because it had earlier filed a Chapter 11 bankruptcy petition. The action proceed against the other defendants, and as to Mat-Maid the state court determined the statute of limitations barred Patterson's wrongful discharge claim. See Patterson v. State Dep't of Agric., 880 P.2d 1038, 1046 (Alaska 1994), cert. denied. 513 U.S. 1127 (1995).

When the bankruptcy court eventually permitted Patterson to pursue his claim against Local 959

in state court, Local 959 removed the action to federal district court. The district court denied Patterson's motion to remand the action to state court and granted Local 959's motion for summary judgment. This appeal followed.

DISCUSSION

Patterson contends the district court erred by refusing to remand the action to state court. He also contends the district court erred by granting summary judgment in favor of Local 959 on his claim for breach of the duty of fair representation.

A. Removal

We review de novo the district court's refusal to remand the action. Eyak Native Village v. Exxon Corp., 25 F.3d 773, 777 (9th Cir. 1994).

Patterson filed his state court action and served Local 959 on May 11, 1988. That action was automatically stayed as to Local 959, pursuant to 11 U.S.C. § 362, because Local 959 earlier had filed a Chapter 11 bankruptcy petition. In April 1991, Patterson sought permission from the bankruptcy court to proceed with his claim in state court against Local 959. In an order filed March 7, 1994, the bankruptcy court abstained pursuant to 28 U.S.C. § 1446(b).

Patterson argues Local 959 did not timely remove the action because it did not file its notice of removal within thirty days after the date it received service of process, back in May 1988. See 28 U.S.C. § 1446(b). Local 959's notice of removal was filed almost six years after such service. Local 959 argues, however, its notice of removal was timely because it was filed with thirty days of March 7, 1994, the date

Patterson obtained relief from the automatic stay. We agree.

If an automatic stay is in effect at the time the plaintiff files a state court action (which was the situation here), the thirty-day period for removal does not begin to run until relief is obtained from the automatic stay. See Easley v. Pettibone Michigan Corp., 990 F.2d 905, 908-09 (6th Cir. 1993). A contrary rule would require a debtor to expend limited resources and to continue to litigate a claim as if no stay were in place. Cf. In re Schwartz, 954 F.2d 569, 571-72 (9th Cir. 1992). If a debtor were forced to continue to litigate the claim, the purposes underlying the automatic stay would be thwarted. Id. Thus, the district court did not err in denying Patterson's motion to remand.

B. Duty of Fair Representation

Patterson next argues the district court erred by granting Local 959's summary judgment motion on his fair representation claim. We review de novo the district court's grant of summary judgment. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). cert. denied. 116 S.Ct. 1261 (1996).

[1] A union breaches its duty of fair representation if its conduct is "arbitrary, discriminatory, or in bad faith." Peters v. Burlington N.R.R., 931 F.2d 534, 538 (9th Cir. 1990) (quotations and citations omitted). A union does not breach its duty of fair representation by acting negligently. Id. A union acts arbitrarily only if it shows an "egregious" or "reckless disregard" for the rights of its members. Id. Further, "[w]e have never held that a union has acted in an arbitrary manner where the challenged conduct involved the

union's judgment as to how best to handle a grievance." Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985).

Patterson contends Local 959 breached its duty of fair representation by not sufficiently investigating his grievance. In support of this contention, Patterson argues Local 959 should have presented evidence that other Mat-Maid drivers stopped for coffee breaks to complete paperwork in the same restaurant where Patterson was waiting to speak with the union representative, and these other drivers were not terminated nor were they even disciplined.

[2] We reject this argument because the evidence would have been irrelevant. Patterson did not stop at the restaurant to take a coffee break and to complete paperwork. He went to Local 959's offices and was waiting at the restaurant hoping to speak with a union representative to obtain permission to attend a collective bargaining meeting.

[3] Patterson next argues Local 959 breached its duty because it failed to introduce evidence that he suffers from post-traumatic stress disorder. We also reject this argument. Local 959 explained it decided to focus on the particular incident which gave rise to Patterson's termination because Patterson insisted he had done nothing wrong and he contended his termination was not warranted. Local 959 determined the medical evidence would have been largely irrelevant to this defense. Local 959 also believed the introduction of the medical evidence could have been damaging because such evidence would have had an adverse effect on the arbitrator's view of Patterson's job performance.

[4] The union's explanation for not presenting the medical evidence is reasonable. If a union provides a reasoned explanation for not pursuing a potential defense, we may not second guess its decision. Stevens v. Moore Bus. Forms, Inc., 18 F.3d 1443, 1448 (9th Cir. 1994). "It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued." Peterson, 771 F.2d at 1254. Local 959's reasoned tactical decision not to present the medical evidence does not amount to a breach of fair representation. See id. at 1254-55.

Patterson also contends Mat-Maid and Local 959 engaged in a civil conspiracy to terminate him. In support of this argument, Patterson refers to a note kept by Seawell, Mat-Maid's general manager. The note apparently was made by Seawell during a conference with Robert Sinnett, a Local 959 official. The note reads:

> Sinnett's comments: "you've got to win. He might leave the state. That's the only way I can get rid of him.

[5] We agree with the district court that this note is not sufficient to raise a genuine issue of material fact. Patterson must produce more than a "mere scintilla" of evidence to avoid summary judgment. See City of Vernon v. Southern Cal. Edison Co., 955 F.2d 1361, 1369 (9th Cir. 1992). Patterson has not produced any evidence of hostility on behalf of Local 959 toward him or any motive that Local 959 would have in conspiring with Mat-Maid to terminate him. Moreover, the evidence demonstrates that Local 959 aggressively sought to get Patterson reinstated during settlement negotiations and arbitration proceedings. The note simply sets forth a truism: if Mat-Maid wanted to get rid of

Patterson, Mat-Maid would have to win the arbitration.

[6] Patterson points to several other instances of Local 959's alleged breach of its duty of fair representation. None, however, has any merit. Local 959 was not required to assign an attorney to represent Patterson during his arbitration proceedings, **see Castelli v. Douglas Aircraft Co.**, 752 F.2d 1480, 1483 (9th Cir. 1985), and it did not have an obligation to advise Patterson of his ability to further pursue a civil action--particularly in light of the weakness of Patterson's case. **Cf. Galindo v. Stoody Co.**, 793 F.2d 1502, 1513 (9th Cir. 1986) (stating a union "need not process a meritless grievance").

[7] Nor has Patterson demonstrated that he suffered any harm due to Local 959's alleged failure to object to the admission of a letter written by Mat-Maid accusing Patterson of gross misconduct. The arbitrator specifically stated he gave no weight to the allegations made in the letter.

[8] Finally, Patterson has not demonstrated that he was harmed in any way by Local 959's failure to review the reprimand letter prior to the time Mat-Maid asked Patterson to sign it. Patterson had ample opportunity to discuss the letter with Local 959 the day after it was presented to him, as well as thereafter when Local 959 set up a meeting with Mat-Maid in an attempt to save the settlement. Patterson, however, rejected the settlement and insisted on arbitration.

CONCLUSION

The district court did not err in determining

Local 959 timely removed the action from state court. Local 959 removed the action within thirty days of the date the bankruptcy court granted Patterson relief from the automatic stay. The district court also did not err in granting summary judgment in favor of Local 959. Patterson failed to raise a genuine issue of material fact in support of his claim that Local 959 breached its duty of fair representation.

AFFIRMED.

NOONAN, Circuit Judge, dissenting:

On the Union's first motion for summary judgment the district court ruled in the Union's favor, except as follows:

> There is, however, one disturbing aspect of this case that precludes summary judgment. It appears that the Union knew that Patterson was suffering from mental or emotional problems which have been diagnosed as post traumatic stress disorder. It also appears that Patterson's mental state might explain his adversarial relations with his supervisors. Consideration of these factors might illuminate the need for a remedy or sanction short of termination. The Union considered this issue of sufficient importance to argue it to the arbitrator, and the arbitrator considered it sufficiently important to mention in his decision:
>
> > I have also considered grievant's testimony regarding his medical condition, and have speculated

> that grievant's performance and behavior of the last several months, i.e., his cyclical swings in performance, to be possibly symptomatic of medical complications arising out of his diagnosed post-trauma syndrome. There was no competent testimony or other evidence to this effect, and the arbitrator was hired to arbitrate, not totally exceed his competence by practicing medicine. I can only suggest that if the grievant does determine that events of the last year were a medically (sic) phenomenon that the company give such fact a consideration.

Docket No. 25, Affidavit of Edwin R. Conyers at Exhibit S at 14.

It appears that the arbitrator would have considered medical evidence if it had been offered, and might have determined that a sanction short of dismissal was appropriate if the medical evidence explained Patterson's behavior and offered significant hope that with specific treatment the behavior would not reoccur. While determining appropriate witnesses is certainly a matter of judgment, the Court hesitates to find that failure to call a treating physician was not irrational, or a reckless disregard of Patterson's rights, without some explanation in the record of the decision not to call medical witnesses. In the absence of such an explanation, a trial would appear

warranted.

The Union renewed its motion submitting the affidavit of Edwin R. Conyers, the business agent who represented Patterson in the arbitration. Conyers swore as follows:

> I believe that medical testimony would have undermined our position on a point of concern to us (the Tranxene incident) and would have conflicted with Mr. Patterson's own beliefs and testimony concerning the significance of his medical condition. In addition the material in the file explained the features of Post Traumatic Stress Disorder and were available for use if they had been consistent with our case.

Patterson replied to this motion with his own affidavit, in which he swore to the contrary:

> I absolutely deny Mr. Conyer's statements in paragraph 7 of his September 26, 1995 affidavit. I do not believe that medical testimony would in any way have undermined our position in the arbitration with respect to the Tranxene incident and it certainly would not have conflicted with my own beliefs and testimony concerning the significance of my medical condition. In fact, I firmly believe, and I believed then, that medical testimony would have been totally consistent with my own beliefs and testimony concerning the significance of my medical condition.

The district court then ruled on the second

motion stating:

> The Union has renewed its motion for summary judgment, filing affidavits and other evidence to show that its decisions were strategic and not reckless or not bad faith . . .. Patterson responded, conceding that the decision was strategic, but contending that the strategy was flawed. . . . That may be. However, mere negligence is not enough.

The court granted the motion for summary judgment.

It is not apparent what changed the court's mind between the first and second motions for summary judgment. It does not appear that Patterson conceded that the decision not to present medical testimony was strategic. Instead, his affidavit declares: "I absolutely deny Mr. Conyers' statements in paragraph 7 of his September 26, 1995 affidavit." There could not be a sharper disagreement over an issue of material fact: was or was not the Union's decision strategic? On that issue alone Conyers (sic) was entitled to go to the jury.

In addition, there was one further piece of evidence. It consisted in a note found in the files of John L. Seawell, the general manager of Mat-Maid, regarding a conference he had held before the arbitration with Robert F. Sinnett, the Secretary-Treasurer of the Union. The note read: "Sinnett's comments. 'you've got to win. You (sic) might leave the state. That's the only way I can get rid of it." (sic)

Sewell (sic) testified that the note conveyed Sinnett's understanding that the only way Sewell

(sic) would be rid of Patterson would be to win the arbitration. Sinnett denied having said that he needed to get rid of Patterson. He did suggest that he might have told Sewell that the only way he could discharge Patterson was by winning the arbitration.

The district court commented on this evidence that it provided "only a scintilla of evidence that the Union engaged in a conspiracy to 'get' Patterson . . .. There is no evidence that would support a plausible motive for the Union to intentionally conspire against Patterson. Patterson has failed to create a disputed issue of fact regarding bad faith."

It is possible that Sewell's and Sinnett's explanation of the note in the files is the correct one. But it is only one way that note might be read. A reasonable juror could read tne note as saying that Sinnett was endorsing Sewell's position. The note does not have closing quotation marks around Sinnett's "comments," but at the very least the first sentence, "you've got to win," might reasonably be interpreted as an expression of enthusiasm for the company prevailing in the arbitration. As the note describes what it is reporting as "comments," a reasonable juror could also conclude that the following two sentences also come from Sinnett and convey his hope to get rid of Patterson. At the very least reasonable minds could differ in the interpretation of the note and could discount Sinnett's and Sewell's later testimony as efforts to explain away a highly embarrassing conversation. Patterson should have been able to present this substantial evidence of a conspiracy between the Union and management to a jury.

The district court said that Patterson showed

no motive for the Union conspiring against him. That view of the facts is one that a reasonable juror also could find not compelling. There is abundant evidence in this record on summary judgment of what a difficult person Patterson was. His evidence as to what his experience in Vietnam had led to in his medical condition shows that he would have maintained a contentious stance toward any authority figure such as the Secretary-Treasurer of the Union. A reasonable juror could conclude that the Union had a strong motive to get rid of a member with Patterson's medical handicap.

Post Traumatic Stress Disorder, since 1980 recognized as a serious medical condition, was particularly aggravated in the case of Vietnam veterans by the political conditions of the war and the reception of veterans on their return. Like the arbitrator in this case we cannot practice medicine, but we can note that a fair and full presentation of Patterson's medical condition after Vietnam would have produced a very different result before an arbitrator who expressed such thoughtful regret that the subject had not been presented. It is a jury question whether the Union failed to present the evidence because it wanted to aid the employer in getting rid of a difficult member.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

William L. Patterson,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs,	)	A94-147 CV
	)	(JKS)
International	)	
Brotherhood of	)	
Teamsters Local 959	)	
	)	
Defendant.	)	
	)	

ORDER DENYING SUMMARY JUDGMENT

William L. Patterson ("Patterson") brings this action against his union--International Brotherhood of Teamsters Local 959 ("Union")--for alleged violation of the duty of fair representation. See § 301 of the Labor Management Relations Act (29 U.S.C. § 185(a)). The action was commenced in state court and eventually removed to this Court. 28 U.S.C. § 1441. This Court has subject matter jurisdiction. 29 U.S.C. § 1331.[1]

[1] Patterson commenced this action in state court in 1986. At that time, Local 959 had declared bankruptcy and a stay prevented litigation of this claim. The Union moved for judgment on this claim in the bankruptcy court. Judge Ross concluded that this was a proper matter for abstention under 29 U.S.C. § 1334. Docket No. 29, Exhibit 1. Since Patterson's claims are primarily federal law and this Court clearly has concurrent jurisdiction over federal claims, this case is not appropriate for

Patterson was employed by Matanuska Maid Dairy ("Mat-Maid") for a number of years as a driver and delivery person. Docket No. 25. His employment was terminated allegedly for cause, and Patterson, assisted by the Union, exhausted the company's grievance procedures. Id. Eventually, the grievance was submitted to an independent arbitrator and a decision adverse to Patterson was reached on July 2, 1986. Docket No. 25. Affidavit of Edwin R. Conyers at Exhibit S. Neither Patterson nor the Union appealed the arbitration decision. Patterson filed a complaint with the U.S. Department of Labor on January 16, 1987. He apparently received no relief. On February 5, 1988, Patterson filed a pro se tort action for defamation against Mat-Maid. See e.g., Patterson v. State, 880 P.2d 1038 (Alaska 1994). On May 2, 1988, Patterson filed a second lawsuit; this time for wrongful termination against Mat-Maid, the Union and its officers, and the arbitrator. Id. Several of Patterson's claims were dismissed. Id. The action against the Union officers and the arbitrator were dismissed on various grounds. Id. The action against Mat-Maid was dismissed because it was not filed in a timely manner under applicable federal law. Id.[2] Finally, a stay of

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mandatory abstention. 28 U.S.C. § 1334(c)(2). Judge Ross elected to proceed under Section 1334(c)(1) (permissive abstention). Docket No. 29, Exhibit 1. Neither party appeals Judge Ross' decision, contends that his decision is binding on this Court, or even suggests that it is a proper topic for consideration.

[2] The Alaska Supreme Court held that Patterson's claims under §301 of the Labor Management Relations Act accrued sometime between July 7 and July 21, 1986 and the claim terminated

proceedings was ordered against the Union pursuant to United States Bankruptcy Code, 11 U.S.C. § 362. Id. In the meantime, the Union had removed the action against it to this Court.

The Union renews, for the third time, its motion for summary judgment. Docket Nos. 25 & 37.[3] The motion is opposed. Docket No. 29. The Union requests oral argument (Docket No. 38), but the parties have sufficiently briefed the issues so that oral argument is not necessary. D.Ak. LR 7.1(i).

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with the expiration of the applicable statute of limitations six months thereafter. The parties are apparently in agreement that the automatic stay precluded an action by Patterson against the Union during the period from January 7 to January 22, 1987 and therefore tolled the statute of limitations until Judge Ross abstained and permitted this action to go forward on March 1, 1994.

The parties have not briefed and I express no opinion on the question of whether the final judgment in favor of Mat-Maid operates via non mutual res judicata to bar this action on the theory that it establishes that Patterson was not wrongly discharged. Collateral estoppel would not appear to apply because the Supreme Court's decision did not specifically address the merits of Patterson's claim.

[3] Judge Hunt declined to rule on the Union's motion because she found Patterson's claim was controlled by the automatic stay in Bankruptcy. Judge Ross declined to rule on the motion because he felt it should be resolved in state court.

DISCUSSION

Summary judgment is appropriate when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). The Court, considering a motion for summary judgment, must view the evidence in the light most favorable to the non-moving party and may not judge credibility or weigh the evidence. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). Factual disputes must be material and genuine to preclude summary judgment. A material fact is one necessary to establish a claim or defense. A dispute is genuine if a reasonable fact finder could resolve the case in favor of the non-moving party. The test at the summary judgment stage is essentially the same as the test for a directed verdict. Anderson, 477 U.S. at 248-52 (defining "material" and "genuine" and applying the directed verdict test)' see also Matsushita, 475 U.S. at 586-88 (non-moving party must come forward with specific facts showing that there is a genuine issue for trial; mere metaphysical doubt is insufficient). In evaluating the evidence, the Court must consider who will have the burden of proof at trial. Celotex, 477 U.S. at 322-25 (if non-moving party will have burden of proof at trial she must produce evidence in response to a motion for summary judgment which conforms to Fed. R. Civ. P. 56(e) and which establishes each element of her claim). The Court must also consider the nature of that burden. Anderson, 477 U.S. at 258 (higher burden of proof affects whether the non-moving party has made a case which a reasonable juror could accept). The Court has been particularly careful in dealing with claims of conspiracy based on

ambiguous circumstantial evidence. See Matsushita, 475 U.S. at 587 (evidence should be consistent with conspiracy and inconsistent with any inference of independent action). The Court must be particularly sensitive to implausible or improbable inferences from circumstantial evidence. See, e.g., id. at 595-98 (stressing the importance of motive in evaluating circumstantial evidence of civil conspiracy and concluding that in the absence of a plausible motive to conspire, conduct consistent with other equally plausible explanations noes not give rise to an inference which will establish a genuine issue of fact regarding conspiracy).

Patterson claims that he was wrongfully discharged from his employment with Mat-Maid in violation of the collective bargaining agreement. The matter went to arbitration and the arbitrator found that Patterson was properly discharged for violating his employer's work rules. Normally, the decision of an arbitrator would be final and preclude this action. Peculiarities of the labor law, however, create a loophole through which Patterson seeks to proceed. Under federal labor law, an employee whose union is a party to a collective bargaining agreement is not free to independently litigate employment disputes with her employer.[4] The Union controls an employee's power to process grievances and the employee's access to neutral decision makers. This works no hardship in the normal course since the union and the employee have common goals and union's success depends upon its ability to maintain the

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[4] It appears that there was a collective bargaining agreement in force between the Union and Mat-Maid at the time of Patterson's grievance. See, e.g., Patterson, 880 P.2d at 1047.

loyalty of the employees who make up its membership. Where, however, the union breaches its duty of fair representation, the employee will not receive the process that emanates from grievance procedures, including arbitration. In this limited situation, an employee may avoid the bar of adverse arbitration if she can show: 1) she was wrongly terminated; and 2) the union breached its duty of fair representation. Hines v. Anchor Motor Freight, 424 U.S. 554, 570-71 (1976); Vaca v. Sipes, 386 U.S. 171, 191 (1967); see also Air Line Pilots Assoc. v. O'Neill, 499 U.S. 65 (1991). Practically speaking, the arbitration establishes that the employee was properly terminated, the second prong of the employee's burden of proof is therefore best approached first. Unless the employee can show that she received ineffective representation, it is not necessary to evaluate her claim against her employer. Mere dissatisfaction with the arbitration or the belief that new evidence or different arguments might change the result is insufficient. By the same token, a showing that the union was negligent or exercised poor judgment is not enough. To prevail, the employee must show either some procedural or ministerial default, or that the union's choices were so far beyond the pale as to be irrational or in bad faith. Seem e.g., Vaca, 386 U.S. at 193-94; Moore v. Bechtel Power Corp., 840 F.2d 634, 636-37 (9th Cir. 1988).

In Moore, the court distinguished between claims based on procedural or ministerial mistakes, and claims based on errors of judgment. Moore, 840 F.2d at 636. The procedural and ministerial mistakes were tested against arbitrariness, which is defined as reckless disregard of employee's rights and requires a finding of prejudice to succeed. Id. The claims based on errors of judgment were tested for

evidence of discrimination or bad faith. Id. Viewed in this light, an employee's burden to show unfair representation is similar to the showing that a criminal defendant must make in order to upset his conviction on the ground of ineffective assistance of counsel. To establish ineffective assistance of counsel, a client must show either gross negligence and prejudice, or a breakdown in the attorney client relationship. Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); See Frazer v. United States, 18 F.3d 778 (9th Cir. 1994). Gross negligence borders on reckless disregard, consisting of conduct falling substantially below a minimum standard of competence. Strickland, 466 U.S. 668. Prejudice must also be found. Id. Ineffective assistance of counsel can be established due to a breakdown of the attorney relationship if the breakdown resulted from disloyalty or conflict of interest to the extent that prejudice is presumed. Cronic, 466 U.S. 648; Frazer, 18 F.3d 778.

Patterson charges both aspects of the test. First, he contends that the Union engaged in a civil conspiracy with Mat-Maid to discharge him on trumped-up charges. Patterson suggested in state court that the arbitrator was privy to the conspiracy. This is a most serious charge. If true, it would undermine the integrity of the arbitration process.[5] No further showing of

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[5] A charge that the Union was disloyal suggests a "structural" defect in the proceeding since the arbitration would not function if only one side was participating. See U.S. v. Olano, No. 87-3128, 1995 WL 468499 (9th Cir. Aug. 9, 1995)(Reinhardt, J., dissenting)(citing Arizona v. Fulminante, 499 U.S. 279 (1990), for the distinction between trial errors and fundamental

prejudice would be required. The Court will therefore first address the claim of bad faith.

It is not contended that Patterson was the victim of racial, religious, ethnic, gender, or age discrimination. It is also not contended that he was active in an insurgent movement within the Union and therefore the victim of Union management retaliation. It appears that Patterson's membership in the Union and employment with Mat-Maid had been uneventful for over seven years. The Union certainly appears to have processed Patterson's grievance with care. The quality of the Union's efforts will be discussed in the next section but there is nothing in the investigation and procedure that suggests bad faith or ill will.

The Union's arguments outlined in the arbitrator's decision seem forceful and to the point. The sole exception mentioned by Judge Ross in an earlier stage of these proceedings is a cryptic note kept by John Seawell, an officer of Mat-Maid, at a conference with Robert Sinnett, a Union official. the note reads, "Sinnett's comments: 'you've got to win. He might leave the state. That's the only way I can get rid of him." Docket No. 29, Exhibit 4. The quotations are not closed. Patterson attributes all of the comments in the note to Sinnett and reads it to say, "I, Sinnett, hope you, Mat-Maid, win,

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errors). In contrast, the charge that the Union, despite good faith, botched the arbitration, requires an evaluation of the record to determine whether the Court has confidence in the result reached. See, e.g., Strickland, 466 U.S. at 694 (test of prejudice is whether confidence in outcome is undermined).

Patterson will leave the state, and I, Sinnett, will be rid of him, Patterson." Seawell testified that the context of the note was Patterson's unwillingness to settle on terms agreed to by Sinnett and Seawell. Seawell contended that the note conveyed Sinnett's understanding that the only way Seawell would be rid of Patterson would be to win the arbitration. Sinnett denied having said that he needed to get rid of Patterson. He did suggest that he might have told Seawell that the only way he could discharge Patterson was by winning the arbitration.

The only other evidence of "civil conspiracy" is Sinnett's sharing with Seawell the fact that Patterson had complained to the NLRB about the Union's handling of his grievance. It does not appear that Patterson had any prior disputes with the Union or any dispute except regarding the processing of this grievance. Viewed either individually or collectively, these two items provide only a scintilla of evidence that the Union engaged in a civil conspiracy to "get" Patterson. See Anderson, 477 U.S. at 251 (scintilla not enough to defeat summary judgment). There is no evidence that would support a plausible motive for the Union to intentionally conspire against Patterson.[6]

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[6] Patterson suggests two "motives." First, that he was a nuisance and an annoyance. There is no evidence that Patterson had "annoyed" anyone at the Union prior to his dispute with Mat-Maid. Patterson would need to offer substantial evidence to support an inference that he was a significant annoyance to the Union before a reasonable juror could find a civil conspiracy on that basis. The other motive implied, but never expressed, is that the Union

Patterson has failed to create a disputed issue of fact regarding bad faith.

Patterson contends that Edwin R. Conyers ("Conyers"), a Union business representative who acted for him at the arbitration, was incompetent as a representative and inadequately represented him at the arbitration. Patterson summarizes his complaints against Conyers in his statement of genuine issues at Docket No. 28. Most of Patterson's complaints go to matters of judgment, where viewed either in isolation or as a group, he fails to make a prima facie case that the Union was irrational in its choices of recklessly disregarded his interests. It appears that reasonable men and women could not differ that the Union conducted a reasonable investigation, that Conyers was competent to represent Patterson, and that the arbitration was vigorously defended. Whether to have Conyers or a lawyer represent Patterson was a judgment within the Union's discretion. The Union made a very strong effort to settle the matter on terms favorable to Patterson. Patterson's real complaint about the settlement is that he did nothing wrong and therefore any sanction was inappropriate. As the arbitrator found, this is simply not true. Patterson also faults the Union for not anticipating that he would have to acknowledge that his conduct warranted a sanction in writing. Patterson believes a Union representative should have been prepared to be present with him when he spoke to management

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was prejudice against people with post traumatic stress disorder and by extension other men and woman (sic) who are mentally or emotionally ill. There is no evidence of a pattern of hostility to the mentally ill. Patterson's claims of motive are pure conjecture.

about the implementation of the settlement. These matters are clearly within the Union's discretion.

Patterson has failed to show that the Union's handling of his grievance was negligent. Even if he had succeeded in showing some conduct, action, or inaction which, viewed in retrospect, might appear negligent, most of his claims would still fail because Patterson cannot show that he was prejudiced. There is no evidence that if the settlement negotiations had been handled differently the case would have settled upon more favorable terms. Patterson says now that he would have accepted the company's terms if that was the only way to save his job, but his contemporaneous conduct is inconsistent with this self serving observation.

Patterson misunderstands the arbitrator's decision and bases a number of arguments upon this misunderstanding. The arbitrator saw the case as presenting two issues: 1) whether Patterson was terminated for just cause on April 30, 1986; and 2) the remedies available to Patterson if his termination was not for cause. The arbitrator recast these questions to ask: 1) whether Patterson violated company work rules; and if he did, 2) whether dismissal, as the sanction for his violation, was too severe. The arbitrator found that there was good cause for termination because Patterson used a company truck to drive to Union headquarters, during business hours, in violation of company work rules. This finding is really undisputed. Patterson concedes that he used the truck, claiming that he wanted to ask Sinnett for permission to sit in on a meeting with Mat-Maid in connection with collective bargaining. As the arbitrator found, this clearly violated company rules. The fact that other drivers on other

occasions also violated company rules is really irrelevant on the issue of violation, although it might have been relevant on the issue of determining the appropriate sanction.

Patterson argued then, and continues to argue now, that his offense was trivial and therefore was no offense at all. He reasons that other drivers took coffee breaks during the day and would go over their paper work at the restaurant or cafe. Patterson overlooks the fact that he did not go to the union office to take a coffee break, but rather, to see Sinnett. It was only because Sinnett was not available that Patterson waited in the adjacent cafe. The fact that the amount of time spent waiting, as recollected by Patterson, approximated the amount of time that would have been spent at a coffee break is mere coincidence. Patterson's justification was, as the arbitrator in effect found, specious. In determining an appropriate remedy, the arbitrator properly considered Patterson's insistence that he did no wrong. The arbitrator pointed out that viewed in isolation, any dereliction in this regard by Patterson, even if a no fault accident occurred, would not have been grounds for such a severe sanction as termination. Nevertheless, when viewed against the totality of Patterson's conduct, termination was warranted.

These conclusions set the stage for evaluating prejudice. It is clear that having a group of drivers come in and testify that they occasionally violated company policy would not have changed the arbitrator's mind that the company work rules had been violated. Nor would it have been relevant to the arbitrator's decision that Patterson's total conduct warranted termination. The arbitrator set out in detail his reasons for concluding that Patterson had already been given chances to correct his

behavior and had failed. Docket No. 25, Affidavit of Edwin R. Conyers at Exhibit S at 13-15.[7] It does not appear that any of the points Patterson wishes the Union had made would have changed that decision. Consequently, Patterson has failed to produce evidence supporting an inference that any of the deficiencies he assigns to the Union caused his discharge or tainted the arbitration.[8] In sum, the bulk of Patterson's

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[7] Patterson complains that the arbitrator considered misconduct that had not been specified as grounds for discharge. Patterson misunderstands the arbitrator's reasoning. The arbitrator considered each of the proffered grounds for termination and rejected all but one: Patterson's frolic and detour during work hours. This was the only ground the arbitrator considered as warranting discipline. Having determined that the company made a prima facie case, the arbitrator then proceeded to consider an appropriate sanction. It was only at this stage that the arbitrator discussed Patterson's work history and the various complaints management had against him to decide whether a sanction less than termination would adequately address management's concerns.

[8] Mat-Maid accused Patterson of a number of instances of bizarre behavior in support of the argument that a sanction less than termination would have been insufficient. The Union vigorously opposed this evidence and the arbitrator expressly declined to consider the bulk of it in reaching his decision. The arbitrator did consider an incident when Patterson overreacted to a verbal exchange and charged a supervisor with assault. Also weighed was Patterson's unwillingness to acknowledge errant behavior in his driving to the Teamster

complaints are no more than the Monday morning quarterbacking that will always follow an unsuccessful arbitration or court proceeding.

There is, however, one disturbing aspect of this case that precludes summary judgment. It appears that the Union knew that Patterson was suffering from mental or emotional problems which have been diagnosed as post traumatic stress disorder. It also appears that Patterson's mental state might explain his adversarial relations with his supervisors. Consideration of these factors might illuminate the need for a remedy or sanction short of termination. The Union considered this issue of sufficient importance to argue it to the arbitrator, and the arbitrator considered it sufficiently important to mention in his decision:

> I have also considered grievant's testimony regarding his medical condition, and have speculated that grievant's performance and behavior of the last several months, i.e., his cyclical swings in performance, to be possibly symptomatic of medical complications arising out of his diagnosed post-trauma syndrome. There was no competent testimony or other evidence to this effect, and the arbitrator was hired to arbitrate, not totally exceed his competence by practicing medicine. I can only suggest that if the grievant does determine that events of the last year

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Mall during work hours. Finally, the arbitrator also considered other occasions, such as unexcused absences, where Patterson seemed to react in a small minded way when reprimanded.

> were a medically induced phenomenon that the company give such fact a consideration.

It appears that the arbitrator would have considered medical evidence if it had been offered, and might have determined that a sanction short of dismissal was appropriate if the medical evidence explained Patterson's behavior and offered significant hope that with specific treatment the behavior would not reoccur. While determining appropriate witnesses is certainly a matter of judgment, the Court hesitates to find that failure to call a treating physician was not irrational, or a reckless disregard of Patterson's rights, without some explanation in the record of the decision not to call medical witnesses. In the absence of such an explanation, a trial would appear warranted.[9]

IT IS THEREFORE ORDERED:

The motion for summary judgment at Docket No. 25 is **GRANTED IN PART AND DENIED IN PART.** The Union is entitled to a determination that it did not act in bad faith or engage in a civil conspiracy to deprive Patterson of his employment and that in general, the Union performed its duty

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[9] The courts treat a § 301 proceeding as a collateral attack on the arbitration. The parties have not addressed the question of whether such an attack sounds at law or in equity, and whether judge or jury should determine whether the attack succeeds. Nor have I considered whether the appropriate disposition at this stage would be a remand to the original arbitrator to allow presentation of medical evidence. Mat-Maid's final judgment against Patterson complicates this aspect of the case.

to adequately represent Patterson at arbitration. The sole question reserved for trial is whether the Union violated its duty to Patterson by failing to produce medical evidence at the hearing in support of a more lenient sanction. The question includes the further question whether such evidence, if produced, would have changed the result at the arbitration.[10]

DATED at Anchorage, Alaska this 7th day of September, 1995.

/s/
HONORABLE JAMES K. SINGLETON, JR.
United States District Judge

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[10] The issue of whether the Union violated its duty of fair representation thus merges with the question of whether Mat-Maid had just cause to terminate Patterson. Both questions turn on whether the Union acted irrationally in not concluding that medical evidence was necessary to save Patterson's position with Mat-Maid. The Court cannot evaluate the Union's reasons for not calling medical witnesses unless it knows those reasons.

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

William L. Patterson v. Int'l Brotherhood of Teamsters Local 959
Case No. A94-147 CV (JKS) FILED
NOV 7, 1995

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Patty Demeter, Case Management

PROCEEDINGS: **ORDER FROM CHAMBERS**

William Patterson sued his union for failing to fairly represent Patterson in connection with the arbitration of a grievance Patterson had against his former employer for wrongful termination. This Court granted in part and denied in part the Union's motion for summary judgment concluding that a single issue remained: whether the union had recklessly disregarded Patterson's rights at the arbitration by failing to introduce expert mental health evidence. See Docket No. 39. The Union has renewed its motion for summary judgment, filing affidavits and other evidence to show that its decisions were strategic and not reckless or in bad faith. Docket Nos. 40 & 44. Patterson responded, conceding that the decision was strategic but contending that the strategy was flawed. Docket No. 43. That may be. However, mere negligence is not enough. This Court must give the Union substantial leeway in litigating at arbitration and may only impose liability if reasonable people could find that the union acted irrationally or in bad faith. See, e.g., Moore v. Bechtel Power Corp., 840 F.2d 634, 636-37 (9th Cir. 1988). Having considered the evidence proffered by both sides, it is clear that a jury acting reasonably could not find that the Union

acted recklessly or acted in bad faith in managing the arbitration in the manner that it did.

IT IS THEREFORE ORDERED:

The renewed motion for summary judgment at **Docket No. 40** is **GRANTED.** The Clerk shall enter judgment dismissing this action. Defendant may recover its costs of action.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: November 6, 1995 SECRETARY'S INITIALS: ab

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDGMENT IN A CIVIL CASE

WILLIAM L. PATTERSON,
Plaintiff,

FILED
NOV 07 1995

vs.

Case Number A94-147 CV (JKS)

INT'L BROTHERHOOD OF
TEAMSTERS LOCAL 959,
Defendant.

_____ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and jury has rendered its verdict.

XX **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT Judgment is hereby entered dismissing this action. Defendant may recover its costs of action.

APPROVED:

/s/ James K. Singleton
U.S. District Judge

11/7/95
Date

PHYLLIS RHODES
Clerk
/s/SharonM.Dichter
(By) Deputy Clerk

Supreme Court, U.S.
FILED
MAR 30 1998
CLERK

No. 97-1236

In The

Supreme Court of the United States

October Term, 1997

WILLIAM L. PATTERSON,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 959,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Statement of the Case	1
A. Procedural History	1
B. Statement of Facts	2
Reasons for Denying the Writ	12
I. The Evidence Does Not Support Petitioner's Assertion Of Error In The Lower Court's Finding That No Triable Issue Of Fact Supports Petitioner's Claim	12
A. The record shows that Patterson's termination was not wrongful or in violation of the collective bargaining agreement	13
B. Local 959's representation of Patterson was not arbitrary, discriminatory or in bad faith	15
1. Applicable legal standard	15
2. Local 959 did not process Patterson's grievance in an arbitrary or perfunctory manner	15
II. There Is No Conflict Between The Circuits On Any Matter Important To Petitioner's Claim	18
Conclusion	22

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Castelli v. Douglas Aircraft Co., 752 F.2d 1480 (9th Cir. 1985) 17

Chrysler Workers Ass'n v. Chrysler Corp., 834 F.2d 573 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988) 13

Del Costello v. Int'l Bros. of Teamsters, 462 U.S. 151 (1983) 13

Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993) 19, 20, 21

Galindo v. Stoody Co., 793 F.2d 1502, 123 LRRM 2705 (9th Cir. 1986) 15, 16

Garcia v. Zenith Electronics Corp., 149 LRRM 2740 (7th Cir. 1995) 17

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 13

In Re Bresler, 119 B.R. 400 (B.R. E.D.N.Y. 1990) ... 19

Jeltsch v. United Parcel Service, 128 LRRM 2502, 108 Lab Cas (CCH) P10, 446 (S.D.N.Y. 1988) 17

Contents

	Page
Moore v. Bechtel Power Corp., 840 F.2d 634, 127 LRRM 3023 (9th Cir. 1988)	15, 16, 17
Patterson v. Dept. of Agriculture, 880 P.2d 1038 (Alaska 1994), *cert. denied, Patterson v. Matanuska Maid*, 513 U.S. 1127 (1995)	1
Schwartz v. Schwartz, 119 BR 207 (B.A.P. 9th Cir. 1990), *rev'd, In Re Schwartz*, 954 F.2d 569 (9th Cir. 1992)	19
Vaca v. Sipes, 386 U.S. 171 (1967)	15
Statutes Cited:	
11 U.S.C. § 362	19
11 U.S.C. § 362(a)	19
11 U.S.C. § 362(d)	20
29 U.S.C. § 185(a)	12
Rule Cited:	
Sup. Ct. R. 10	12

I

STATEMENT OF THE CASE

A. Procedural History

This is Petitioner's second attempt to gain this Court's review of the facts surrounding the termination of his employment. *See Patterson v. Dept. of Agriculture*, 880 P.2d 1038 (Alaska 1994), *cert. denied, Patterson v. Matanuska Maid*, 513 U.S. 1127 (1995).

Petitioner (hereafter "Patterson") filed his first complaint in this action on April 18, 1988, in the Superior Court for the State of Alaska against Respondent Local 959 and several other defendants. The complaint followed an arbitration decision upholding Patterson's termination. Patterson's claims against the other defendants were resolved against him on summary judgment. He appealed to the Alaska Supreme Court, which affirmed. *Id.* Patterson's first (unsuccessful) petition for certiorari followed. *Id.*

The state court action against Local 959 did not proceed because 959 had been operating under the protection of the United States Bankruptcy Court since 1986. CR 1, Ex. B; Supp. ER at 16; CR 7, Attachment 8; Supp. ER at 19-25.[1] Patterson, therefore, filed an adversary complaint against Local 959 in the Bankruptcy Court. ER 25, Ex. 1, Witt Aff. at ¶ 5. The Bankruptcy Court entered a judgment of abstention March 7, 1994 (CR 1, Ex. D; Supp. ER at 17), thus clearing the way

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1. Throughout this brief, the following abbreviations are used:

"CR" refers to the Docket Number used by the United States District Court below;

"ER" refers to Petitioner's excerpt of record below; and

"Supp. ER" refers to Respondent's supplemental excerpt of record below.

for Patterson to proceed against Local 959. Local 959 then waived service of the original (1988) complaint, and on March 31, 1994, removed the action to the United States District Court for the District of Alaska. ER 1.[2] Patterson moved to remand. ER 5. The District Court denied the motion, holding that the time for removal did not begin to run until the Bankruptcy Court relinquished jurisdiction. ER 10.

Patterson filed an amended complaint on September 2, 1994 (CR 21; Supp. ER at 26-30) and Local 959 answered October 31, 1994. CR 22; Supp. ER at 31-34. Local 959's first motion for summary judgment (ER 25) was opposed. ER 29. Local 959 replied. ER 37. The Court denied the motion for summary judgment but significantly narrowed the issues. ER 39. Local 959 filed a second motion for summary judgment. ER 40, 43, 44. The District Court granted this motion, resolving the matter. ER 45. Judgment was entered November 7, 1995. ER 46.

On November 22, 1995, Patterson filed a Notice of Appeal with the United States Court of Appeals for the Ninth Circuit. The appeal was fully briefed and oral argument was heard July 17, 1997. The Court of Appeals affirmed the holding of the District Court on August 15, 1997. Petition at A3. On August 29, 1997, Patterson filed a motion for rehearing *en banc*. The motion was circulated to the full Court of Appeals. No judge requested a vote on the suggestion for rehearing *en banc*. Petition at A1-A2. The petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected, on October 2, 1997. Petition at A2.

Patterson then filed the pending petition.

B. Statement of Facts

On April 30, 1986, Patterson was employed by Matanuska Mail, Inc., as a route delivery driver. After reporting to work

2. The Notice of Removal was erroneously dated March 31, 1994.

and picking up his paperwork, he drove directly away from his assigned route. CR 25, Ex. A to Ex. 1 at 34-35; Supp. ER at 42, 43. He drove to the Union offices of Teamsters Local 959, located across town from the location of his first assigned delivery. *Id.* at 37-38; Supp. ER at 45-46. His purpose was a personal errand; he hoped to speak with the Union's secretary/ treasurer, Robert Sinnett. ER 29, Ex. 2 at ¶ 20.[3] As Patterson was leaving the Union office parking lot, his delivery truck was struck by another vehicle. *Id.* at ¶ 23.

After the accident, Patterson completed his deliveries. *Id.* at 38; Supp. ER at 46. Upon his return to the Matanuska Maid plant, he was informed that his employment was terminated. *Id.* at 31, Supp. ER at 39.[4]

Patterson's conduct violated two very clear written work rules authorized by the applicable collective bargaining agreement.[5] The work rules state in relevant part:[6]

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3. Patterson was not a Union officer, shop steward, representative or agent; he was merely a member of a collective bargaining unit.

4. Patterson was terminated for unauthorized use of company equipment for personal use, gross disobedience and being involved in two automobile accidents within a year involving property damage to others. ER 25, Ex. A to Ex. 2. The collective bargaining agreement governing the terms of Mr. Patterson's employment expressly provided that "the following violations shall be subject to discharge *without*" notice or suspension. Included in the list are two of the violations for which Mr. Patterson was terminated: gross insubordination and unauthorized use of company equipment for personal use. ER 25, Ex. B to Ex. 2 at 23.

5. Article 11, Section 11.15 at 11 authorizes the work rules. ER 25, Ex. B to Ex. 2 at 14.

6. The "Matanuska Maid Dairy Company Work Rules and Regulations" effective December 12, 1985 are attached to the Collective Bargaining Agreement. ER 25, Ex. B to Ex. 2 at 23-28.

SECTION A

The following violations shall be subject to discharge *without* the progressive steps of a warning notice and/or suspension. . . .

5. Unauthorized use of Company equipment for personal use.

. . . .

12. Dishonesty of any kind.

. . . .

SECTION B

The following Work Rules shall be subject to the progressive steps of discipline.

I. ACCIDENTS:

. . . .

c. Involvement in accident with injury or property damage to others:

First Offense — Suspension pending investigation and disciplinary action (including, but not limited to, discharge) if appropriate.

Second Offense — Subject to discharge.

. . . .

> The foregoing Rules and Regulations have been formulated to serve as guideposts for the employees. It is to be understood that in describing certain offenses and the penalties therefore, the Company has not limited the violations for which it may discipline an employee to the offenses covered in these Work Rules and Regulations. The Company may exert discipline in other types of cases should the situation warrant, including, but not limited to, cases where an employee's record shows a pattern of Work Rule violations in two or more areas.

ER 25, Ex. B to Ex. 2 at 23-24.

Patterson violated the dishonesty rule by clocking in to receive wages before running a personal errand. He thus subjected himself to discharge without further warning.[7] Patterson also violated the prohibition against personal use of company equipment. Again he subjected himself to discharge without warning or suspension. The accident in the Teamster office parking lot was also Patterson's second property damage to others, subjecting him to discharge under the clearly articulated progressive steps of discipline.[8] ER 25, Ex. B to Ex. 2 at 24.

Upon learning that his employment was terminated, Patterson returned to the offices of Local 959 and saw Edwin Conyers, the Business Representative assigned to administer the collective bargaining agreement between Teamsters Local 959 and Matanuska Maid. CR 25, Ex. A to Ex. 1 at 31-32; Supp. ER at 39, 40; ER 25, Ex. 2 at ¶ 9. Conyers held a

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7. The company did not cite to this rule in the discharge letter. ER 25, Ex. A to Ex. 2.

8. The rule is applicable without reference to fault of the driver. ER 25, Ex. B to Ex. 2 at 24 (Section B(I)(c)).

Bachelor of Science and Masters of Education degree from the University of Texas. As of April 30, 1986, he had been employed by Local 959 as a Business Representative for approximately three years. He was trained in grievance/arbitration procedures by Local 959's general counsel and by the training staff of the International Brotherhood of Teamsters. He had attended numerous seminars in grievance/arbitration procedures sponsored by The American Arbitration Association. He had also participated as a panelist in numerous panel arbitrations and had assisted Local 959's legal staff in the preparation and presentation of approximately twelve discipline arbitrations. CR 25, Ex. 2.

Patterson and Conyers discussed the purported reasons for his termination. ER 25, Ex. A to Ex. 1 at 31, 32; Supp. ER at 39, 40. Conyers then called Joe Van Treeck, Matanuska Maid Plant Manager, and arranged to meet with him that afternoon to discuss the Patterson termination. ER 25, Ex. 2 at ¶ 9.

Conyers and Patterson met with Van Treeck and John Seawell, Matanuska Maid's General Manager, on April 30 to discuss the reasons for Patterson's termination. *Id.* at ¶ 10. Conyers attempted to convince Seawell that Patterson was at Local 959's offices that morning for legitimate Union business, that the accident was not Patterson's fault, that property damage had been minimal and that Patterson should not be terminated. Conyers' arguments were not accepted by either Seawell or Van Treeck and they upheld Patterson's termination. CR 25, Ex. A to Ex. 1 at 41; Supp. ER at 48; ER 25, Ex. 2 at ¶ 10. Sometime during the day, Patterson was given a letter informing him he was terminated and stating the reasons for his termination. The stated reasons for his termination were: unauthorized use of company equipment for personal use, gross disobedience, and second accident within a year involving property damage to others. CR 25, Ex. A to Ex. 1, deposition Ex. 2; Supp. ER at 65.

Conyers pursued a written grievance with Matanuska Maid over Patterson's termination. *See* CR 25, Ex. A to Ex. 1, deposition Ex. 3; Supp. ER at 66; ER 25, Ex. 2 at ¶¶ 11, 29 (Affidavit Ex. C). On May 6, Conyers started to prepare for the possible arbitration of Patterson's grievance; he first requested that Patterson sign a release so he could obtain a copy of Patterson's personnel file. CR 25, Ex. A to Ex. 1 at 52 and Ex. 5; Supp. ER at 67; ER 25, Ex. 2 at ¶¶ 12, 30 (Affidavit Ex. D).

On May 6, Conyers received a letter from Seawell requesting a meeting between himself and Sinnett as required by Article 9.05 of the contract. ER 25, Ex. 2 at ¶¶ 13, 31 (Affidavit Ex. E). The meeting to attempt informal resolution on a "principal to principal" basis was held.

On May 12, Conyers was called into Sinnett's office; present in Sinnett's office was Seawell. Sinnett informed Conyers that he and Seawell had reached a tentative resolution of Patterson's grievance, which was a letter of reprimand with a 30-day suspension without pay. Sinnett also informed Conyers that they had agreed to extend the period for informal settlement until June 2. ER 25, Ex. 2 at ¶ 15. Sinnett knew that Patterson was in Conyers office and asked him to bring Patterson in so that he could explain the tentative settlement. When Sinnett, Patterson and Conyers were in Sinnett's office, Sinnett explained the proposed settlement: the termination would be converted to a 30-day suspension without pay with a letter of reprimand. Sinnett advised Patterson to accept the settlement, reasoning that there is always a risk of losing an arbitration and suspension was better than termination. *Id.* at ¶ 16. Patterson was adamant that he wanted his grievance arbitrated. CR 25, Ex. A to Ex. 1 at 53; Supp. ER at 52, Ex. 2 at ¶ 16.

After the tentative settlement of his termination grievance was discussed (30-day suspension without pay with letter of reprimand), Patterson no longer considered himself terminated

from Matanuska Maid. Patterson reached this belief even though he had not worked for Matanuska Maid between April 30 and May 14. Patterson informed Local 959 that if "worse came to worse," he would take the 30 days without pay. CR 25, Ex. A to Ex. 1 at 54; Supp. ER at 53.

In furtherance of this proposed informal resolution, Conyers received from Sinnett a copy of Seawell's May 6 letter with the following handwritten notation:

> Met with Seawell 10 AM, 5/8, to meet again 5/12, 10 AM
>
> ---
>
> Offer of 30 day suspension & letter of reprimand made to Bill Patterson on 5-12-86, 4:45 — Bill wants to go arbitration — will gather material by 5/26/86

ER 25, Ex. 2 at ¶¶ 14, 32 (Affidavit Ex. F).

On May 14, Conyers (959) wrote to Seawell (Mat-Maid) and informed him that Patterson had rejected the settlement offer. *Id.* at ¶¶ 17, 33 (Affidavit Ex. G). On May 20, Conyers received a letter from Seawell confirming the agreement to extend the informal resolution period until June 2 and transmitting to Conyers a copy of Patterson's personnel file. *Id.* at ¶¶ 18, 34 (Affidavit Ex. H).

After receipt of Patterson's personnel file, Patterson and Conyers met and discussed the items in the file, the issues contained in his termination letter and his work history. CR 25, Ex. A to Ex. 1 at 55, 56, 104, 105; Supp. ER at 54, 55, 62, 63. Patterson made daily trips to the Union Hall to meet with Conyers and Sinnett. *Id.* at 42; Supp. ER at 49. Conyers recalls meeting with Patterson one to three times a week between May 2 and June 23. Patterson met with Conyers at the direction of

Sinnett to discuss the merits of his grievance and prepare for arbitration. *Id.* at 96; Supp. ER at 60. During those meetings, Conyers and Patterson discussed the status of his case and the content and importance of various documents. ER 25, Ex. 2 at ¶ 26.

On May 21, Patterson took a routine job call from the Local 959 Dispatch Hall. The employer was Matanuska Maid. Matanuska Maid refused to accept Patterson as an employee and he was told to see the Union Dispatcher, at the Union Hall. Patterson returned to the Union Hall and saw the dispatcher, who provided him a copy of a letter that he had been given by Matanuska Maid. The letter informed Local 959 that Patterson had been terminated for cause and that he should not be dispatched to Matanuska Maid. CR 25, Ex. A to Ex. 1 at 57, 58, Ex. 8; Supp. ER at 56, 57, 68; ER 25, Ex. 2 at ¶¶ 20, 79 (Affidavit Ex. J).

On June 1, Patterson attempted without invitation to report to work at Matanuska Maid. CR 25, Ex. A to Ex. 1 at 75; Supp. ER at 59. Matanuska Maid refused to accept Patterson back. When he refused to leave, Matanuska Maid called the police, who escorted him from the premises and issued a trespass citation. *Id.* at 75, Ex. 13; Supp. ER at 71.

The informal resolution period was set to expire on the next day, June 2, 1992. Patterson decided to approve the settlement he had previously rejected. Sinnett went to work to effect the settlement. He called Seawell at approximately 1:30 p.m. to arrange Patterson's return to work. CR 25, Ex. D to Second Affidavit of John Seawell; Supp. ER at 92. Seawell agreed to June 3, 1992, at 8:00 a.m. *Id.* Sinnett sent a note to Conyers asking him to call Patterson and to tell him to report to work at Matanuska Maid at that time. CR 25, Ex. 2 at ¶¶ 21, 80 (Affidavit Ex. K). Conyers left that instruction on Patterson's telephone recorder. Patterson reported to work and performed work for Matanuska Maid on June 3 and 4. At approximately

4:00 p.m. on June 4, Seawell asked Patterson to sign the letter documenting the settlement of his grievance.[9] Patterson refused to sign, thus rejecting the terms of settlement. Prior to leaving, Patterson spoke with Sinnett by telephone.[10] CR 25, Ex. A to Ex. 1 at 97, Ex. 17; Supp. ER at 74. A meeting was set for the next morning to try to preserve the settlement. That effort failed when Patterson insisted on arbitration. CR 25, Ex. 3 at ¶ 5; Supp. ER at 88.

Beginning May 12, when Patterson first rejected the settlement of his grievance, Conyers prepared to arbitrate. ER 25, Ex. 2 at ¶ 24. He met frequently with Patterson, read appropriate sections in *How Arbitration Works*, by Elkouri and Elkouri, reviewed reported labor arbitration cases for precedent, and reviewed Patterson's personnel file and relevant documents. *Id.* at ¶¶ 24, 25.

During the course of preparing for the arbitration, Conyers and Patterson focused on the issues raised in the April 30

9. The letter was part of the agreed upon settlement, but was not prepared until June 4 because Seawell had surgery on June 3.

10. On Monday, June 2, Sinnett called Seawell and told him that Patterson would accept the 30-day suspension without pay. Sinnett and Seawell discussed when Seawell would prepare and have Patterson sign a letter acknowledging the settlement. Seawell said he could not accomplish that until after his oral surgery scheduled for Tuesday, June 3. On Wednesday, June 4, Seawell and Van Treeck asked Patterson to sign the settlement letter. Patterson refused. Seawell then called Sinnett and explained what happened. Sinnett then set up a meeting for the next morning with Patterson and Conyers. Seawell told Sinnett he would be at the Union offices the next morning and if there was an agreement, get his letters signed. On June 5, when Seawell was arriving at Sinnett's office, Patterson and Conyers were leaving. Conyers informed Seawell that Patterson wanted arbitration. Seawell told Patterson "you are terminated Bill — that's the subject of arbitration, please turn in your uniforms promptly." ER 25, Ex. 1.

termination letter. They discussed Patterson's post-traumatic stress disorder ("PTSD"); Patterson did not relate his termination to his PTSD disorder. Conyers and Patterson also discussed the February 6 letter written by Bevins, (CR 25, Ex. A to Ex. 1, deposition Ex. 19; Supp. ER at 82; ER 25, Ex. 2 at ¶ 31, Affidavit Ex. P), because it was in his personnel file, but Patterson did not inform Conyers that Seawell and Bevins had previously agreed never to use the letter against him.

Conyers' preparation also included interviews with several Matanuska Maid employees. Conyers and Patterson discussed who should be called as witnesses and they agreed to call Matanuska Maid employees Gary Arp, Joe Hogan and Joel Billings. During the course of preparing for arbitration, Conyers gave to Patterson copies of all documents pertaining to his grievance. ER 25, Ex. 2 at ¶ 27.

On June 23, arbitrator Jerry Thorn conducted a hearing on the grievance. Over Conyers' objection, Matanuska Maid introduced the February 6 Bevins letter. Arbitrator Thorn overruled the objection. *Id.* at ¶ 36. Matanuska Maid also introduced testimony concerning obscene telephone calls by Patterson. Conyers objected to this testimony because it was hearsay and not a reason stated in the April 30 termination letter. Arbitrator Thorn allowed the questions. Conyers, after consulting with Patterson, later called Shirley Fallacaro, an alleged recipient of the obscene telephone calls, to rebut the testimony. *Id.* at ¶ 35. Conyers also introduced numerous exhibits on Patterson's behalf. Ten exhibits were introduced to show possible biases and discrimination against Patterson by Matanuska Maid and several were introduced to show Patterson was a valuable employee. *Id.* at ¶ 38.

On July 2, the arbitrator upheld the termination. *Id.*, Ex. S; Supp. ER at 1-15.

REASONS FOR DENYING THE WRIT

Under the standards adopted by this Court, a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. No such reason exists here.

I.

THE EVIDENCE DOES NOT SUPPORT PETITIONER'S ASSERTION OF ERROR IN THE LOWER COURT'S FINDING THAT NO TRIABLE ISSUE OF FACT SUPPORTS PETITIONER'S CLAIM

The gravamen of this petition is that the lower court erred in failing to find a dispute of material fact sufficient to bar entry of summary judgment. Patterson complains that:

> The district court and court of appeals weighed the evidence, determined credibility of witnesses and viewed the evidence most favorably to the [Union]. They almost entirely disregarded [Petitioner's] version of the facts, quoted the record out of context and considered the facts in isolation, rather than in their relationship to each other.

A petition should "rarely" be granted on such grounds. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

This is not that rare case where compelling facts might warrant the Supreme Court's review. Patterson's complaint alleged a violation of the duty of fair representation. *See* Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). The District Court and the Court of Appeals, on *de novo* review, correctly held that Patterson failed to show a genuine issue of fact which would support his claim.

Patterson's burden in the Appellate Court was to show that the record reflected a genuine issue of fact whether: (1) his termination was wrongful because it violated the applicable collective bargaining agreement; *and* (2) the Union breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976). Patterson was required to meet *both* prongs of the test. *Chrysler Workers Ass'n v. Chrysler Corp.*, 834 F.2d 573, 582-583 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). As this Court has stated:

> The two claims are inextricably interdependent. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the union." *Mitchell*, 101 S. Ct. at 1565-1566. . . . The employee may if he chooses, sue one defendant and not the other; but the case he must prove is the same, whether he sues one, the other, or both.

Del Costello v. Int'l Bros. of Teamsters, 462 U.S. 151, 164-65 (1983).

A. The record shows that Patterson's termination was not wrongful or in violation of the collective bargaining agreement

The first prong of the test in evaluating the validity of the hybrid 301 action is whether the plaintiff's termination violated the terms of the applicable collective bargaining agreement. Patterson's action does not meet that test. His discharge was upheld on facts that are incontestable.

The ground for discharge which Patterson challenges is the charge of using company equipment for "personal use." (Appellant's Brief below at 26-27.) Patterson does not challenge

the reasonableness or the enforceability of the rule; nor does he challenge the fact that he broke it. Instead, he claims the rule should not be enforced against *him* because to do so would violate the employer's duty of good faith and fair dealing. He claims there were three other Matanuska Maid drivers at the Teamster's Mall having coffee on April 30, 1986. He concludes that because these three drivers were not dismissed from employment, it is unlawful to fire him. Patterson appears to suggest that the other three drivers (if they exist) were simultaneously in violation of the rule prohibiting personal use of company equipment. It was not, however, against company rules to be present at the Teamster's Mall. CR 29, Ex. 5; Supp. ER at 99-103. There is no evidence that any of these individuals were violating company rules. If they were taking a coffee break and not deviating substantially from their routes, they were not in violation of company rules. *Id.* In contrast, Patterson admits to the personal errand of trying to locate Robert Sinnett. In addition, Patterson drove across town *away from and off his route*, on company time with company equipment to run that personal errand. This was not a coffee break. The fact that others may have been on a legitimate coffee break at a restaurant located in the building Patterson went across town to visit does not make Patterson's conduct rightful or bar his employer from disciplining him for it.

In summary, Patterson does not dispute the fact that he was discharged for a clear breach of a valid written policy which has been incorporated into the collective bargaining agreement. His attempt to excuse his clear breach of the policy against personal use of company equipment falls short of raising a genuine issue. If Patterson means to assert that the company is estopped from enforcing this policy, he fails to so argue. If he means to assert that his conduct is excused because the company tolerated others who violated this policy, he falls short by failing to show either that others have violated it or that the company has tolerated those violations. For these reasons, the Appellate Court correctly affirmed the District Court's judgment in favor of Teamsters Local 959.

B. Local 959's representation of Patterson was not arbitrary, discriminatory or in bad faith

Failure to meet the burden of showing wrongful termination is a sufficient basis for entry of summary judgment. However, here, the second element of plaintiff's cause of action is missing as well. To establish a breach of Local 959's duty of fair representation, Patterson must show not only wrongful termination, but that Local 959's conduct in handling that termination was arbitrary, discriminatory or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). This is a very heavy burden, which Patterson failed to meet.

1. Applicable legal standard

In processing Patterson's grievance, Local 959 would only breach its duty of fair representation if it arbitrarily ignored the grievance or processed it in a perfunctory manner. *Id.* at 191. Local 959 would not breach its duty to Patterson even if it engaged in negligent conduct in processing his grievance. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513-1514, 123 LRRM 2705 (9th Cir. 1986). To violate Patterson's right to fair representation, Local 959 would have to have acted in "reckless disregard" of his rights. *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 127 LRRM 3023 (9th Cir. 1988). That did not occur.

2. Local 959 did not process Patterson's grievance in an arbitrary or perfunctory manner

The Union has broad discretion in handling a grievance. *Id.* at 636. It is not mandatory and not usual to process a grievance through an arbitration hearing. However, once notified that Patterson was going to be terminated, Local 959 promptly met with the company, filed a grievance on Patterson's behalf, pursued settlement possibilities, and aggressively processed the grievance through arbitration.

In *Galindo v. Stoody Co.*, *supra*, the Ninth Circuit overruled a District Court's finding that the Union breached its duty of fair representation by investigating and presenting a grievance to an arbitrator negligently. As the record reflects, Local 959 aggressively pursued the grievance. Local 959 met frequently with Patterson to prepare for the arbitration; it conducted a significant investigation into the merits of the grievance and zealously pursued the actual arbitration.

Patterson's argument does not correctly compare the conduct against the legal standard. Patterson neither cites nor discusses *Moore v. Bechtel Power Corp.*, 840 F.2d 634 (9th Cir. 1988). In *Moore*, the Ninth Circuit considered whether the Union had breached the duty of fair representation when it refused to take two claims of wrongful discharge to arbitration. The case involved two employees, both of whom were assigned to work in different areas where radiation might have been present. Each refused and asked to be assigned to non-radiation areas. Both employees were terminated. The Union unsuccessfully processed grievances for both through a multi-step process. The Union did not proceed to the final step - arbitration in either case; the members then sued for breach of the duty of fair representation. The Court of Appeals noted that it had construed the unfair representation doctrine to protect the broad discretion which has been vested in unions to act in what they perceive to be their members' best interests. *Id.* at 636. To accomplish this, the court is required to examine whether a member is challenging the Union's judgment. If so, the member must prove discriminatory or bad faith conduct:

> If it is a union's judgment that is in question, as it is in this case, a plaintiff may prevail only if the union's conduct was discriminatory or in bad faith. Arbitrariness alone would not be enough. Only when the challenged conduct was procedural or ministerial does arbitrariness become controlling.

Id. at 636 (citations omitted). The court further observed that Ninth Circuit law also requires the plaintiff to show that the alleged breach of duty "prejudices a strong interest of the employee." *Id.*

It is not enough for Patterson to second guess Local 959's handling of the grievance. He must show the conduct was discriminatory or in bad faith and he must show the conduct prejudiced a strong interest. Here, as in *Bechtel*, Patterson challenges the Union's judgment. He does not present a claim that the Union missed time limits or was guilty of some other ministerial act or omission that might support a claim the Union acted arbitrarily.

Local 959 made the best of a very weak claim that Patterson had been wronged by his employer. It twice settled the case on terms that would have reinstated Patterson to employment. He elected to pursue arbitration. Although Patterson complains the grievance was presented by Mr. Conyers rather than the Union's general counsel or secretary/treasurer, he does not produce evidence that this was a decision made in bad faith or with discriminatory intent. The cases have firmly established that the Union has no duty to supply an attorney to assist a grievant in arbitration. *See Jeltsch v. United Parcel Service*, 128 LRRM 2502 n.10, 108 Lab Cas (CCH) P10, 446 (S.D.N.Y. 1988), *citing Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480 (9th Cir. 1985) ("It is for the Union to decide the circumstances under which an attorney will be supplied to a grievant . . . . Where a Union representative assists an employee at arbitration, the Union's failure to provide the employee with an attorney is not a breach of the duty of fair representation."). *See also Garcia v. Zenith Electronics Corp.*, 149 LRRM 2740 (7th Cir. 1995) (noting Union's decision in handling grievance procedures includes right to limit role of outside attorneys on behalf of grievant and that employee is not entitled to be represented by someone other than Union representative in arbitration proceedings).

Moreover, Patterson does not show that Mr. Conyers' representation harmed any of his interests. Mr. Conyers prepared at length, he met several times with Mr. Patterson, he called every witness Patterson wanted and argued every issue Patterson wanted to try. A review of the arbitrator's decision leaves no room to conclude another advocate could have done more for Mr. Patterson.

Patterson complains both about the evidence produced at arbitration and the evidence not produced. He complains about the handling of settlement negotiations and the failure to be present when a disciplinary letter was first shown to Patterson, on the grounds that the Union should have known the psychiatric state of Patterson was such that he would respond poorly to the letter. These are all matters of judgment. No evidence of discriminatory or bad faith motives is presented in connection with any of this generalized second guessing. Nor does Patterson show how the result of the arbitration would have been different had the trial been conducted the way he now thinks it should have been. The arbitrator's decision sets forth the factual foundation and the reasoning for the arbitrator's result. The facts are true and the reasoning is sound.

On the foregoing record, the District Court concluded, and the Court of Appeals affirmed, that "a jury action reasonably could not find that the Union acted recklessly or acted in bad faith in managing the arbitration in the manner that it did." ER 45. The affidavits and other evidence submitted by the parties, together with the applicable legal authorities, solidly support that decision.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON ANY MATTER IMPORTANT TO PETITIONER'S CLAIM

For the purpose of gaining this Court's review, Petitioner asserts that a conflict exists between the United States Courts of

Appeals on a legal issue important to his claim. He argues that a handful of cases have regarded actions taken in violation of the automatic stay of bankruptcy as voidable, rather than void, as such actions are regarded in the Ninth Circuit.[11]

However, Patterson errs in concluding that this distinction is material to his claim. Whether action taken in violation of a bankruptcy stay is deemed void or voidable, the courts agree that such actions are invalid. *See Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 908-09 (6th Cir. 1993).[12] In short, the "conflict" on which Patterson relies is merely a variance in terminology;[13] there is no disagreement on the legal effect of the relevant facts.

The operative facts regarding the removal of this case were not contested below. Local 959 filed a voluntary petition under Chapter 11 of the Bankruptcy Code on August 18, 1986. ER 7, Ex. A. Patterson filed suit in state court, serving Local 959 on May 11, 1988, in violation of the automatic stay effected by

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11. The filing of a bankruptcy petition automatically stays all action against the debtor or property of the debtor. Specifically, this includes the commencement, including the issuance or employment of process, of a judicial proceeding against the debtor. 11 U.S.C. § 362(a). Thus, both Patterson's initial judicial filing and his service of process against Local 959 were in violation of the automatic stay. Pursuant to 11 U.S.C. § 362, the Superior Court for the State of Alaska entered an order recognizing the statutory stay of the proceeding against Local 959. CR 7 at 25; Supp. ER at 25.

12. Those cases which have treated actions taken in violation of the stay as voidable have done so in recognition that the Bankruptcy Court, on appropriate motion, may by judicial order retroactively lift the stay as to certain acts. *See, e.g., Schwartz v. Schwartz*, 119 BR 207 (B.A.P. 9th Cir. 1990), *rev'd, In Re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *In Re Bresler*, 119 B.R. 400 (B.R. E.D.N.Y. 1990).

13. *See* discussion, *infra* at n.14.

11 U.S.C. § 362(d). ER 5, Return of Service. Patterson pursued his claim in the Bankruptcy Court by adversary complaint dated April 29, 1991, Case No. 3-86-00470, Adv. No. 3-86-00470-001. ER 1 at 3, ER 25, Ex. 2. The Bankruptcy Court abstained from exercise of Bankruptcy Court jurisdiction and granted Patterson relief from stay in an order dated March 1, 1994, filed March 7, 1994. CR 1, Ex. D; Supp. ER at 17-18.

Local 959 waived service of process of Patterson's state court complaint and removed the case to U.S. District Court. ER 1. Patterson challenged the removal in the District Court and in the Court of Appeals. He argued that the removal was untimely because it did not occur within 30 days of the filing of his 1988 complaint in state court, even though the matter was removed within 30 days after the Bankruptcy Court granted relief from stay.

The District Court held that the removal was timely, and the Court of Appeals affirmed. The Court of Appeals, citing *Easley v. Pettibone Michigan Corp.*, 990 F.2d at 908-09, held,

> If an automatic stay is in effect at the time the plaintiff files a state court action [which was the situation here], the thirty-day period for removal does not begin to run until relief is obtained from the automatic stay.

Petition at A8.

Research reveals *no* Circuit which has adopted a conflicting rule, and Petitioner has cited none. Whether or not actions taken in violation of the stay are termed "void" or "invalid" or "voidable," the result in this case is the same.[14] Local 959 did

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14. The *Easley* opinion noted that "[a] majority of the circuits [including the sixth] have held that actions taken in violation of the automatic stay are void" and that the Fifth Circuit was "alone in (Cont'd)

not waive its right to remove Patterson's claim because the removal petition was filed within 30 days of the date on which the stay was lifted. *See Easley*, 990 F.2d at 908 (By operation of the automatic stay, the commencement of a post-petition action against a debtor, "whether void or voidable," does not take place for removal purposes until the stay is lifted.).

As the court below correctly held, whether the filing and service of Patterson's complaint was void or voidable, Local 959 could not file its removal petition until the Bankruptcy Court lifted the stay. *Cf. Easley*, 990 F.2d at 908 ("actions filed in violation of the automatic stay are removable once the stay is lifted, if only to have a federal court declare that the action is void."). There *is* no conflicting authority requiring a bankrupt to respond to a post-petition state court lawsuit brought against it. As the court below noted, Petition at A8, a contrary rule would vitiate one of the key protections offered by the Bankruptcy Code, which is protection from proceedings brought by creditors.

(Cont'd)

explicitly holding that actions taken during the pendency of the stay are voidable." However, as the court went on to note, the focus should be on the procedural defect at issue, and not on the adjective used to describe it. The words void and voidable

> are not synonyms, however, they are often used interchangeably and imprecisely. "There is great looseness and no little confusion in the books in the use of the words void and voidable, growing, perhaps, in some degree, out of the imperfection of the language, since there are several kinds of defects which are included under the expressions void and voidable, while there are but two terms to express them all."

Id. at 909 (citations omitted). Ultimately, the *Easley* court rejected both terms, finding, " 'invalid' a more appropriate adjective to use when defining an action taken against a debtor during the duration of the automatic stay." *Id.*

In sum, Petitioner seeks review of a "conflict" which does not exist. Petitioner is challenging a Ninth Circuit opinion which is based on settled law and sound public policy. There is no reason, compelling or otherwise, for this Court to grant Patterson's petition.

CONCLUSION

For the foregoing reasons, the pending Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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